2009

Fort Pierce Business Park LC v. ST Paper Company LLC and Closing Resources LLC : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

FORT PIERCE BUSINESS PARK, L.C., a Utah limited liability company Plaintiff/Appellant, **v.** S1 PAPER COMPANY, LLC, a Delaware limited liability company, and CLOSING RESOURCES, LLC, a Maryland limited liability company, Defendant/Appellee.	Case No. 20090091-CA

On appeal from an order of the Fifth District Court for Washington County
The Honorable G. Rand Beacham

BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

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JURISDICTION

The Utah Supreme Court transferred this appeal to the Utah Court of Appeals. Therefore, this Court has jurisdiction pursuant to Utah Code section 78A-4-103(j).

ISSUE AND STANDARD OF REVIEW

Closing Resources, an out of state escrow company, voluntarily agreed to act as escrow agent on a Utah real estate transaction. The seller of the property, Plaintiff Fort Pierce Business Park, is a Utah resident. Closing Resources directed emails to Fort Pierce in Utah, confirming acceptance of the deposit of escrowed funds and receipt of the underlying purchase agreement. After the buyer defaulted on the transaction, Fort Pierce demanded that Closing Resources release the deposit to Fort Pierce. Closing Resources directed letters to Fort Pierce in Utah in which Closing Resources refused to release the deposit and instead threatened to simply unilaterally release the deposit to the defaulting buyer. The sole issue presented is whether Utah has specific personal jurisdiction over Closing Resources in litigation concerning entitlement to the deposit?

Standard of Review. The trial court's decision granting Closing Resources' motion to dismiss was a pretrial jurisdictional decision made solely on documentary evidence. Therefore, the trial court's decision is reviewed for correctness with all factual disputes and inferences resolved in favor of the plaintiff, Fort Pierce. See Pohl, Inc. of Am. v. Webelhuth, 2008 UT 89, ¶8, 201 P.3d 944; Neways, Inc. v. McCausland, 950 P.2d 420, 422 (Utah 1997).

Preservation. This issue was preserved below at R. 101-134, 191 and was certified by the trial court as a final order for purposes of appeal at R. 178-79.

DETERMINATIVE STATUTES AND CONSTITUTIONAL PROVISIONS

Statutes and constitutional provisions that are of central importance to this appeal are the following:

UTAH CODE § 78B-3-201 (2008):

> (1) This part is known as the "Nonresident Jurisdiction Act."
>
> (2) It is declared, as a matter of legislative policy, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who, through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.
>
> (3) The provisions of this part, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

* * *

UTAH CODE § 78B-3-202 (2008):

> As used in this part:
>
> (1) The words "any person" mean any individual, firm, company, association, or corporation.
>
> (2) The words "transaction of business within this state" mean activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the state.

* * *

UTAH CODE § 78B-3-205 (2008), which provides in relevant part:

> [A]ny person or personal representative of the person, whether or not a citizen or resident of this state, who, in person or through an agent, does any of the following enumerated acts is subject to the jurisdiction of the courts of this state as to any claim arising out of or related to:
>
> (1) the transaction of any business within this state;
>
> (2) contracting to supply services or goods in this state;
>
> (3) the causing of any injury within this state whether tortious or by breach of warranty;

* * *

U.S. CONST. amend. XIV, § 1, which provides, in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Nature of the Case

This case involves a dispute over Fort Pierce Business Park's entitlement to a deposit, as liquidated damages, being held by Closing Resources, an out-of-state escrow agent on a failed Utah real estate transaction between Fort Pierce Business Park and ST Paper Company. This appeal challenges the trial court's decision to grant Closing Resources motion to dismiss for lack of personal jurisdiction, on the grounds that the escrow agent did not have sufficient minimum contacts with the State of Utah for the court to exercise jurisdiction over Closing Resources. The trial court's decision on the motion to dismiss was a pre-trial decision based entirely on documentary evidence.

B. Course of Proceedings and Disposition Below

Following the failure of a real estate deal, Plaintiff/Appellant Fort Pierce Business Park filed suit against Defendant/Appellee Closing Resources as well as against Defendant ST Paper Company. [R. 1.] Closing Resources immediately moved to dismiss for lack of personal jurisdiction. [R. 87.] The trial court heard oral argument—not an evidentiary hearing—following which it granted the motion, based solely on documentary evidence. [R. 191, 160.] The trial court then certified its order granting the motion to dismiss as final for purposes of appeal under Rule 54(b). [R. 178-79.] Fort Pierce timely filed a notice of appeal. [R. 181.]

STATEMENT OF FACTS[1]

Plaintiff/Appellant Fort Pierce Business Park, LC ("Fort Pierce") is a Utah limited liability company with its principal place of business in Washington County. [R. 1.] In July 2006, Fort Pierce, as seller, entered into an agreement ("Agreement") with ST Paper Company ("ST Paper"), a company doing business in Utah, as buyer, for ST Paper to purchase certain real property located in Washington County for approximately $3.5 million. [R. 3.][2] Because the property was actually owned by the State of Utah, ultimate

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[1] This statement treats all factual allegations in the complaint as true, and considers them, and all reasonable inferences to be drawn from them in a light most favorable to Fort Pierce, the nonmoving party. Pohl, Inc., 2008 UT 89 at ¶2.

[2] The Agreement is attached at Addendum 1. The Agreement, including all amendments thereto, appears in the record at R. 12-44. For ease of reference, we have cited the Agreement directly.

conveyance of the property was to be accomplished by a patent signed by the Governor. [R. 3, 18; Agreement §§ 1.3.4, 1.3.5, 6.1.]

The Agreement required ST Paper to deposit the sum of $40,000.00 into escrow. [R. 3.] At ST Paper's request [R. 191 Tr. 14:19-25, 15:1-8], the escrow agent for the transaction was Defendant/Appellee Closing Resources, LLC ("Closing Resources"). [R. 3.] Closing Resources is a Maryland company. [R. 2.] Under the terms of the Agreement, Fort Pierce and ST Paper agreed that upon signing, the Agreement would "constitute Escrow Instructions . . . to Closing Resources, LLC." [R. 13; Agreement § 1.2.1.]

The escrow instructions informed Closing Resources that if ST Paper defaulted under the Agreement, Fort Pierce could elect to receive the deposit as liquidated damages. [R. 17; Agreement § 5.6.] The escrow instructions further directed Closing Resources to "surrender the Deposit to Seller upon demand" in the event that Fort Pierce elected to accept liquidated damages. [R. 17; Agreement § 5.6.]

On August 8, 2006, upon receipt of the $40,000.00 deposit from ST Paper, Closing Resources sent an email to Fort Pierce's Utah attorney, in Utah, confirming that it had received both an original deposit of $40,000.00 into escrow and a copy of the Agreement, including the escrow instructions. [R. 117.] Specifically, Closing Resources' email stated: "This email is to confirm that Closing Resources, LLC is in receipt of the Contract dated 7-14-06 and the deposit check in the amount of $40,000, for

the purchase of real property located in the Fort Pierce Industrial Park in St. George, Utah by ST Paper Company, LLC." [R. 117.]

The terms of the Agreement required the closing of the transaction to take place at a title company in Utah, and required Closing Resources to deliver the deposit to the title company in Utah. See Agreement § 6.3 ("Closing Resources, LLC, shall deliver the Deposit to the Title Company"). In addition, the Agreement contained a jurisdiction and venue clause specifying the Fifth Judicial District Court in Washington County, Utah, as the court with exclusive venue and jurisdiction over any disputes arising under the Agreement. See Agreement § 13.5.

The Agreement was later amended and, pursuant to the amendment, ST Paper deposited an additional $40,000.00 with Closing Resources, which now held $80,000.00 on deposit. [R. 4.] Closing Resources then directed another email to Fort Pierce's attorney, in Utah, confirming the receipt of the amendment to the Agreement and the additional deposit check of $40,000.00. [R. 118.]

Prior to the closing date, ST Paper made various requests for extensions, which Fort Pierce accommodated. [R. 5.] As the agreed upon closing date of November 16 drew near, Fort Pierce requested that the Governor of the State of Utah issue the patent for the property. [R. 5-6.] The Governor signed the patent on November 9, and the State of Utah provided the patent to the Utah based title-company. [R. 5.] ST Paper, however, failed to close on the November 16 deadline and thus defaulted under the Agreement. [R. 6.] The Agreement provided that if ST Paper defaulted, Fort Pierce could elect to retain

the deposit as liquidated damages by providing notice of the same to Closing Resources. See Agreement § 5.6. If Fort Pierce made such an election and provided such notice to Closing Resources, Closing Resources was required to "surrender the Deposit to [Fort Pierce] upon demand." Agreement § 5.6.

In reliance on the liquidated damages provision in the Agreement, Fort Pierce sent a letter to Closing Resources giving notice that ST Paper had defaulted and that Fort Pierce had elected to receive the deposit as liquidated damages. [R. 6, 121, 124.] The letter also directed Closing Resources to surrender the deposit to Fort Pierce. [R. 121, 124] Shortly thereafter, in response to Closing Resources' silence, Fort Pierce sent another letter to Closing Resources informing it that Fort Pierce expected Closing Resources to comply with the terms of the Agreement and thus surrender the deposit to Fort Pierce. [R. 6, 121, 126.]

Closing Resources responded by sending a letter to Fort Pierce indicating that due to the dispute between ST Paper and Fort Pierce concerning entitlement to the deposit, Closing Resources was not willing to release the deposit to Fort Pierce and would request permission to pay the deposit into court if litigation was commenced, allowing the parties to resolve the dispute between themselves. [R. 6, 121-122, 128.] Closing Resources followed with another letter to Fort Pierce, this time threatening to return the $80,000.00 deposit to ST Paper within twenty days if there were no developments in the dispute. [R. 6, 122, 130.]

Fort Pierce then filed suit against both ST Paper and Closing Resources in Fifth District Court in Washington County, Utah. [R. 1.] With respect to Closing Resources, Fort Pierce requested an order and judgment requiring Closing Resources to release the deposit to Fort Pierce. [R. 1-9.] Closing Resources was served with the complaint [R. 45-47] and shortly thereafter filed a motion to dismiss for lack of personal jurisdiction. [R. 87.] Closing Resources was represented by the same attorneys as ST Paper. [R. *passim*.]

Included with Closing Resources' motion was an affidavit from its principal, Cheryl Rose, which contained generalized statements that Closing Resources has no office, mailing address, or employees in Utah, is not licensed to do business in Utah, does not pay taxes in Utah, and so on. [R. 97-98.] However, Rose did not dispute the specifics of the transaction or Closing Resources' role in the transaction, including that Closing Resources served in the role of escrow agent on the transaction; voluntarily accepted the deposit of the funds; voluntarily accepted the Agreement; and voluntarily directed correspondence to Fort Pierce in Utah. [R. 97-98.] In fact, Rose acknowledged that Closing Resources was acting in the capacity as escrow agent for the transaction and conceded that Closing Resources was aware the property at issue was located in Utah. [R.98; Aff. Rose ¶5 (stating "Closing Resources has not acted as escrow agent with respect to any property located in Utah, other than the property at issue in the instant lawsuit.") (Emphasis added).]

The trial court heard oral argument on the motion, and, based solely on the documentary evidence in the record granted Closing Resources' motion to dismiss. [R. 191, 160.] The trial court reasoned that the transaction "has no more to do with Utah than it has to do with Alaska other than that's just a name on a paper. For jurisdiction in Utah you have to have something other than somebody in Utah sent me something." [R. 191 Tr. 8:25, 9:1-3.] The trial court thereafter certified its order of dismissal as final under Utah R. Civ. P. 54(b). [R. 178-179.] Fort Pierce now appeals.

SUMMARY OF ARGUMENT

This was not a case of "someone from Utah sent me something." Closing Resources voluntary agreed to serve as the escrow agent for a Utah real estate transaction. The property is in Utah; the property owner is the State of Utah; the seller is a Utah resident; the closing was to take place in Utah; and the underlying agreement, which included the escrow instructions, contains a Utah choice of forum clause. Contrary to the trial court's opinion—this case has everything to do with Utah.

The "constitutional touchstone" of due process is "whether the defendant purposefully established 'minimum contacts' with the forum State." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). In determining whether a defendant's forum related activities establish minimum contacts, the overarching issue is one of forseeability—"the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." Id. (quoting World-Wide Volkswagen Corp. v.

Woodson, 444 U.S. 286, 295 (1980)). This standard does not require the defendant to actually step foot in the forum state. See SII MegaDiamond, Inc. v. Am. Superabrasives, Corp., 969 P.2d 430, 433 (Utah 1998). Rather, personal jurisdiction exists if the defendant's actions "are 'purposefully directed' toward residents of [the forum] State.'" Id. at 435 (quoting Burger King Corp., 471 U.S. at 476).

In the course of acting as escrow agent, Closing Resources purposefully directed its conduct to Utah. This included emails to Fort Pierce in Utah, acknowledging receipt of the underlying agreement; a letter to Fort Pierce flatly refusing Fort Pierce's request to release the deposit; and finally another letter threatening to unilaterally release the deposit to ST Paper. This action forced Fort Pierce to sue Closing Resources to obtain the deposit. In addition, as the escrow agent on this transaction, Closing Resources contracted to supply escrow services in Utah and voluntarily assumed fiduciary duties to its Utah principal—Fort Pierce. It could therefore reasonably anticipate that it could be haled into court in Utah on this transaction.

Closing Resources' actions were purposefully directed towards Fort Pierce in Utah. In light of Closing Resources' contacts with Utah and its status as escrow agent on the Utah real estate transaction, the trial court's decision that Closing Resources could not have reasonably anticipated being haled into Utah on this very transaction was wrong. Closing Resources has sufficient minimum contacts with Utah such that it should reasonably anticipate being haled into court here. Therefore, the trial court should be reversed.

ARGUMENT

SPECIFIC JURISDICTION: A TWO PART INQUIRY

At issue in this appeal is whether Utah has specific personal jurisdiction over Closing Resources under the circumstances of this case. "'[S]pecific personal jurisdiction gives a court power over a defendant only with respect to claims arising out of the particular activities of the defendant in the forum state' and only if the defendant has 'certain minimum local contacts.'" Pohl, Inc. of Am. v. Webelhuth, 2008 UT 89, ¶10, 201 P.3d 944 (quoting Arguello v. Indus. Woodworking Mach. Co., 838 P.2d 1120, 1122 (Utah 1992)). Specific personal jurisdiction is determined by a two part inquiry. See id. "First, do [the plaintiff's] claims arise from one of the activities listed in the [long-arm] statute,' and second, whether the 'defendant's contacts with this forum [are] sufficient to satisfy the due process clause of the fourteenth amendment.'" Id. (quoting Anderson v. Am. Soc'y of Plastic & Reconstructive Surgeons, 807 P.2d at 826).[3]

Fort Pierce need only demonstrate "a prima facie showing of personal jurisdiction," to defeat Closing Resources' challenge to the court's jurisdiction. Neways,

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[3] The Utah Supreme Court previously indicated that the due process analysis should be conducted first because satisfying due process standards also satisfies the long-arm statute. See SII MegaDiamond, Inc. v. Am. Superabrasives Corp., 969 P.2d 430, 433 (Utah 1998). However, in its most recent pronouncement on the specific jurisdiction test the Court made clear that "[i]n determining whether specific jurisdiction exists, our analysis begins with the long-arm statute. 'If the relevant state statute does not permit jurisdiction, then the inquiry is ended; if it does, then the question is whether the statute's reach comports with due process.'" Pohl, Inc., 2008 UT 89 at ¶10 (quoting Arguello, 838 P.2d at 1122). See also Pohl, Inc. of Am. v. Webelhuth, 2007 UT App 225, ¶¶19-20, 164 P.3d 225 (Orme, J., dissenting) (recognizing that court should consider long arm statute prior to engaging in due process inquiry), *rev'd* Pohl, Inc., 2008 UT 89. Following Pohl, this brief begins with an analysis of Utah's long-arm statute.

Inc. v. McCausland, 950 P.2d 420, 422 (Utah 1997). And because the trial court's decision granting the motion to dismiss was made solely on documentary evidence, all facts alleged in the complaint, all factual disputes, and all inferences are to be made in favor of Fort Pierce. See Pohl, Inc., 2008 UT 89 at ¶8; Neways, Inc., 950 P.2d at 422; Anderson v. Am. Soc'y of Plastic & Reconstructive Surgeons, 807 P.2d 825, 827 (Utah 1990). Against these standards, the trial court's decision to allow Closing Resources to escape the reach of this state's courts should be reversed.

I. CLOSING RESOURCES BOTH TRANSACTED BUSINESS WITHIN AND CONTRACTED TO SUPPLY SERVICES IN UTAH THEREBY PLACING IT WITHIN THE REACH OF UTAH'S LONG ARM STATUTE.

Utah's long-arm statute provides that the jurisdiction of Utah's courts will be extended over any person where the claim arises out of or is related to "the transaction of any business within this state" or the "contracting to supply services or goods in this state". Utah Code Ann. § 78B-3-205(1), (2) (Supp. 2008). Closing Resources has done both.

A. Closing Resources Transacted Business Within Utah.

Utah Code section 78B-3-202 defines the "transaction of business within this state" to mean "activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the state." Utah Code Ann. § 78B-3-202(2) (Supp. 2008). Under this broad definition, it is not necessary for a party to actually set foot in Utah in order to transact business here. See SII MegaDiamond, Inc. v. Am. Superabrasives, Corp., 969 P.2d 430, 433 (Utah 1998). Rather, as Closing

Resources did in this case, a party may transact business within the state remotely by mail or electronic communication. See id. at 434-35. "'So long as a commercial actor's efforts are 'purposefully directed' toward residents of [Utah], we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction []here.'" Id. at 435 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)). See also Fenn v. Mleads Enters., Inc., 2006 UT 8, ¶12, 137 P.3d 706 ("Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residences, the exercise of specific jurisdiction is proper[.]") (quotation omitted)).

Here, Closing Resources reached beyond its borders and transacted business in Utah. It sent communications by both email and mail to Fort Pierce in Utah. In accepting the role as escrow agent, Closing Resources knew that it would be required to direct its activities into Utah and for the benefit of a Utah resident—it was, after all, the escrow agent in a transaction for the sale of real property in Utah in which the seller, Fort Pierce, was a Utah resident, the State of Utah itself was the property owner, and the final transaction was to occur in the office of a Utah title company. This constitutes the transaction of business in Utah for purposes of Utah's long-arm statute. See, e.g., Neways, Inc., 950 P.2d at 424 (holding the defendant's telephone calls, acceptance of a single check, and wire transfers to Utah constituted transaction of business within Utah for purposes of the long arm statute." (quoting Utah Code Ann. § 78-27-24 (now codified at § 78B-3-205)).

This conclusion is bolstered by the legislative mandate that courts apply Utah's long-arm statute "to ensure maximum protection to citizens of this state," Utah Code Ann. § 78B-3-201(3), and the Legislature's broad definition of transacting business within Utah to mean any "activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the state." Utah Code Ann. § 78B-3-202(2). Certainly Closing Resources engaged in activities that would affect Fort Pierce within Utah. It knew or should have known that its refusal to release the deposit to Fort Pierce and its direct threat—communicated by letter to Fort Pierce in Utah—would adversely affect Fort Pierce in Utah and force Fort Pierce to file suit in the state of Utah.

Closing Resources' activity places it squarely within the behavior that the Legislature intended to reach through Utah's long-arm statute. See, e.g., Utah Code Ann. § 78B-3-201(2) (declaring the policy of Utah to "provide its citizens with an effective means of redress against nonresident persons, who, through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.").

B. Closing Resources Contracted to Supply Services in Utah.

In granting the motion to dismiss, the trial court gave considerable weight to the fact that Closing Resources did not actually sign the Agreement. [R. 191 Tr. 7:23-25, 8:1-7.] But Closing Resources' signature on the Agreement is irrelevant to the

jurisdictional question. It is undisputed that Closing Resources voluntarily accepted the deposit of funds from ST Paper pursuant to the Agreement; accepted the Agreement which contained the escrow instructions detailing Closing Resources' duties to the parties; and even acknowledged in a sworn affidavit that it acted as the escrow agent in this transaction, which it knew was a Utah transaction. [R. 98.]

A valid escrow agreement cannot exist without an underlying contract. See JOYCE PALOMAR, TITLE INSURANCE LAW § 20:3, at 20-6, 7 (2002) ("A valid underlying contract is required to support an escrow agreement.").[4] And the escrow company is not required to actually sign the escrow agreement. Rather, an escrow contract typically takes the form of written instructions which may be contained within the underlying real estate contract—much like the Agreement at issue here. See PALOMAR, § 20:3, at 20-8 ("The parties to an escrow usually give the depositary specific written instructions setting forth the terms for the escrow arrangement. Nevertheless, the instructions may be oral, though oral instructions will not be permitted to modify written instructions. Instructions also may be implied from the express instructions given to the escrow holder."). Here, it is undisputed that the Agreement, which Closing Resources accepted and acknowledged, and at least for a time acted under, constituted the escrow instructions for the transaction. See Agreement § 1.2.1.

Closing Resources cannot both concede that it was the escrow agent on this transaction, which it knew could only be performed in Utah, and at the same time claim

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[4] For the Court's convenience, we have attached cited portions of Professor Palomar's treatise, TITLE INSURANCE LAW, at Addendum 4.

there is no contract to supply services in Utah. These two positions cannot co-exist. Having conceded it was the escrow agent for the failed Utah real estate transaction underlying this dispute, Closing Resources has necessarily conceded it contractually bound itself to perform services in Utah pursuant to the written instructions contained in the Agreement.

Under the terms of the Agreement itself, the parties stipulated that Closing Resources would supply services to the parties in Utah. Among other things, the Agreement required Closing Resources to deliver the deposit to the Utah based title company when the transaction closed. See Agreement § 6.3 (stating "Closing Resources, LLC, shall deliver the Deposit to the Title Company"). Moreover, in the event the transaction fell apart—as it eventually did—Closing Resources retained the duty to continue to supply services in Utah, to a Utah resident, by continuing to work with Fort Pierce to resolve Fort Pierce's right to the deposit as liquidated damages. See, e.g., Agreement §§ 5.2 & 5.6 (requiring Closing Resources to direct conduct to Utah by returning funds and documents in the event of a default). See also Town of Haverhill v. City Bank & Trust Co., 402 A.2d 185, 187 (N.H. 1979) (reasoning that although out of state escrow company's work would be done in Massachusetts, it was connected to a contract to be performed at least in part in New Hampshire and therefore escrow company contracted to supply services in New Hampshire for purposes of the long arm statute).

In sum, the only way for Closing Resources to fulfill its obligations as escrow agent was to supply services within Utah pursuant to its escrow agreement. Again, this is conduct that places Closing Resources squarely within the behavior that the Legislature intended to reach through Utah's long-arm statute.

II. CLOSING RESOURCES HAS SUFFICIENT MINIMUM CONTACTS WITH UTAH TO SATISFY FEDERAL DUE PROCESS REQUIREMENTS.

A. The "Constitutional Touchstone" of Due Process in the Context of Specific Jurisdiction is "Whether the Defendant Purposefully Established 'Minimum Contacts' in the Forum State."[5]

"Federal due process requires that in order to subject a defendant to specific personal jurisdiction, there must be 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" Pohl, Inc., 2008 UT 89 at ¶23 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Requiring minimum contacts between the defendant and the forum state ensures "that courts only exert jurisdiction in cases where the defendant creates a 'substantial connection with the forum state' such that the defendant 'should reasonably anticipate being haled into court there.'" Id. (quoting MFS Series Trust III, 2004 UT 61, ¶10, 96 P.3d 927).

There is no rigid test with which to analyze minimum contacts. Instead, a defendant's "'contacts with the forum State must be assessed individually.'" Id. (quoting Calder v. Jones, 465 U.S. 783, 790 (1984)). "'In judging minimum contacts, a court

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[5] Burger King Corp., 471 U.S. at 474 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

properly focuses on "the relationship among the defendant, the forum, and the litigation."'" Id. at ¶24 (quoting Calder, 465 U.S. at 788 (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977))). Due process does not turn on "the quantity of the contacts with the state, but 'rather upon the quality and nature' of the minimum contacts and their relationship to the claim asserted." Arguello, 838 P.2d at 1123 (quoting International Shoe, 326 U.S. at 319 (emphasis added)). Rather, "[t]he essential question is whether the defendant purposefully and voluntarily direct[ed] his activities toward the forum so that he should expect . . . to be subject to the court's jurisdiction based on his contacts with the forum." Pohl, Inc., 2008 UT 89 at ¶24 (alteration original) (citation omitted).

"Finally, even if there are minimum contacts, 'the concept of fair play and substantial justice may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.'" Pohl, Inc., 2008 UT 89 at ¶23 (quoting MFS Series Trust III, 2004 UT 61 at ¶10). As set forth below, Closing Resources has sufficient minimum contacts with Utah to satisfy federal due process requirements and substantial justice will be served by allowing Fort Pierce to pursue its remedies against Closing Resources here in Utah.

B. Closing Resources Should Reasonably Anticipate being Haled into Court in Utah on this Specific Transaction.

The United States Supreme Court has explained that

> [b]y requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit[.]"

Burger King Corp., 471 U.S. at 472 (quoting Shaffer, 433 U.S. at 218 (Stevens, J., concurring in judgment); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

Thus, for example, a defendant cannot be haled into a foreign jurisdiction based solely on the "unilateral activity" of another. Burger King Corp., 471 U.S. at 474. The transaction at issue in this case, however, did not fall out of the skies over Maryland into Closing Resources' lap. Rather, Closing Resources voluntarily entered into this transaction; voluntarily accepted the position of escrow agent; voluntarily accepted the terms of the Agreement; and voluntarily accepted the terms of the escrow instructions, which included duties to the parties to be performed in the state of Utah. And by doing so, Closing Resources purposefully, voluntarily, and knowingly directed its activities towards Utah and could reasonably anticipate that it could be haled into a Utah court for problems arising from this transaction.

Specifically, and as detailed more fully below, Closing Resources (1) knew that this was a Utah based real estate transaction that required Closing Resources to direct its conduct to Utah; (2) as an escrow agent, Closing Resources had a fiduciary duty to its Utah principal, Fort Pierce, thus giving Closing Resources fair warning that its conduct on this transaction could land it in a Utah courtroom; and (3) the Agreement contained a forum selection clause specifying Utah as the exclusive forum for disputes concerning the transaction. Thus, Closing Resources "purposefully and voluntarily direct[ed] his

activities toward the forum" and otherwise "should expect . . . to be subject to the court's jurisdiction based on his contacts with the forum." Pohl, Inc., 2008 UT 89 at ¶24.

1. Closing Resources knew that this transaction, by its very nature, was to be performed in Utah and required Closing Resources to purposefully direct its conduct to Utah.

First, the following undisputed facts show that Closing Resources purposefully directed its activities to Utah and that Closing Resources should have reasonably anticipated being haled into a Utah court for any problems arising from this transaction:

- Closing Resources accepted ST Paper's $40,000.00 deposit and sent an email to Fort Pierce in Utah confirming that it had received both the deposit into escrow and a copy of the Agreement. Indeed, the email itself acknowledges that the transaction is for "the purchase of real property located in the Fort Pierce Industrial Park in St. George, Utah" [R. 117.]

- Closing Resources acknowledges that it was acting as escrow agent for this transaction and knew that the property at issue was located in Utah. [R. 98 (stating "Closing Resources has not acted as escrow agent with respect to any property located in Utah, other than the property at issue in the instant lawsuit.") (Emphasis added).]

- Closing Resources accepted ST Paper's additional $40,000.00 deposit and sent another email to Fort Pierce in Utah confirming that it had received both the additional deposit of funds into escrow and a copy of the amendment to the Agreement.

- The Agreement, which served as the escrow instructions to Closing Resources (at § 1.2.1) required Closing Resources to surrender the deposit to Fort Pierce on demand, if Fort Pierce elected to retain the deposit as liquidated damages in the event of ST Paper's default. See Agreement § 5.6 (providing "If [Fort Pierce] elects to accept liquidated damages, Closing Resources, LLC, shall surrender the Deposit to [Fort Pierce] upon demand.

- The Agreement also required Closing Resources to pay the deposit to Fort Pierce in the even the Agreement was properly terminated by Fort Pierce. See Agreement § 5.2 ("If this Agreement is properly terminated by [Fort Pierce] as provided in Section 5.1, Closing Resources, LLC, shall pay the

Deposit to [Fort Pierce]").

- Fort Pierce made several written demands on Closing Resources that ST Paper had defaulted and requesting that Closing Resources send Fort Pierce the deposit as required by the Agreement. Closing Resources responded to this demand, by directing a letter to Fort Pierce indicating that due to the dispute as to which party breached the Agreement, Closing Resources was not willing to release the deposit to either Fort Pierce or ST Paper and would request permission of the court to pay the deposit into court if litigation was commenced.

- Closing Resources then sent another letter to Fort Pierce this time threatening to simply release the $80,000.00 deposit to ST Paper.

The trial court refused to accept that these facts demonstrated sufficient minimum contacts to subject Closing Resources to Utah jurisdiction. It demanded more. [R. 191 Tr. 9:22-25, 10:1.] But what more could be expected of an out of state escrow other than its acceptance of the role of escrow agent its unequivocal acceptance of the escrow instructions; its decision to direct communications to the Utah, the forum state, confirming receipt of escrowed funds; its acceptance and acknowledgment of the underlying agreement, and thereafter directing communications concerning the escrow pursuant to the escrow instructions within the Agreement.

These acts are exactly the type, nature, and number of contacts one would expect of an escrow agent in Closing Resources position on such a transaction. Indeed, "[a]nalyzing 'the quality and nature' of the minimum contacts and their relationship to the claim asserted,'" Lee v. Frank's Garage & Used Cars, Inc., 2004 UT App 260, ¶15, 97 P.3d 717 (quoting Arguello, 838 P.2d at 1123), it becomes clear that the contacts between Closing Resources and Fort Pierce were related directly to the claim Fort Pierce

ultimately asserted—entitlement to the deposit that Closing Resources holds as escrow agent pursuant to the terms of the Agreement. Affirming the trial court's decision will necessarily remove any and all out-of-state escrow agents who volunteer to act as escrow agents for Utah real estate transactions from the reach of this state's courts.

Further, Closing Resources went beyond the steps necessary to complete its role as escrow agent for this transaction: it sent an additional communication to Fort Pierce in Utah threatening to release the funds to ST Paper, an act that would irreparably harm Fort Pierce. This action was akin to firing a shot across Fort Pierce's bow—knowing full well that Fort Pierce is docked in Utah. The claims against Closing Resources for the deposit arise directly from Closing Resources' contacts with Utah, specifically its flat refusal to release the deposit to Closing Resources. Contrary to the trial court's conclusion, this contact satisfies due process requirements. See Arguello, 838 P.2d at 1123 (explaining that specific jurisdiction is proper where litigation in forum state "arises out of" and is therefore related to the contacts with the forum state).

2. As the escrow agent on a Utah real estate transaction with fiduciary duties to a Utah resident, Closing Resources had fair warning that its conduct on this transaction could land it in a Utah courtroom.

In addition, a minimum contacts analysis should take into account contemplated future consequences of the particular transaction at issue. Burger King Corp., 471 U.S. at 479 (stating "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in

determining whether the defendant purposefully established minimum contacts within the forum.").

The trial court based its decision on the erroneous premise that this was just an ordinary commercial transaction. [R. 191 Tr. 10:14-21 (likening this transaction to purchasing maple syrup in Vermont, reasoning that "if there is something wrong with the maple syrup then I better go where the syrup came from")]. But this was not an ordinary commercial transaction for the sale of goods in interstate commerce and Closing Resources is not an ordinary commercial actor involved in an arm's length transaction.

As the escrow agent on the transaction Closing Resources assumed a fiduciary responsibility to each party to the transaction. See Freegard v. First W. Nat'l Bank, 738 P.2d 614, 616 (Utah 1987) (stating "it is well established that an escrow agent assumes the role of the agent of both parties to the transaction, and as such, a fiduciary is held to a high standard of care in dealing with its principals"); PALOMAR, § 20:3, at 20-6 ("upon accepting a purchase contract for escrow or closing, a title company assumes a duty to follow all explicit and implied instructions for escrow and closing and to perform all services undertaken with the skill and diligence reasonably expected of a real estate professional. . . [and] . . . will be liable in contract for breaching any escrow or closing instructions and in tort for failing to exercise ordinary skill and diligence in any aspect of its employment.").

Closing Resources made a choice to act as escrow agent for a Utah based real estate transaction—it was not forced into that role. It knew (or at the very least should

have known) that by doing so it was accepting a fiduciary relationship with Fort Pierce, a Utah resident, on a transaction for the sale of real property in Utah. It knew that if it breached the escrow agreement by refusing to release the deposit to Fort Pierce, as required as a result of ST Paper's default, its refusal would be felt by Fort Pierce in Utah. And it did ignore Fort Pierce's demand, the consequences of which were felt directly by Fort Pierce in Utah. That is sufficient for jurisdiction. See, e.g., Burger King Corp., 471 U.S. at 480 (finding jurisdiction in Florida because, among other things, the out-of-state defendant's breach "caused foreseeable [economic] injuries to the corporation in Florida").

And if that were not enough, Closing Resources knew that after accepting the deposit and escrow instructions, its involvement would not end by that mere acceptance. It knew that its Utah principal might later instruct it—as Fort Pierce later did—to release the deposit to Fort Pierce. See Agreement §§ 5.3, 5.6. Closing Resources knew that to consummate the transaction would require Closing Resources to deliver the deposit to the title company in Utah. See Agreement § 6.3 (at closing "Closing Resources, LLC, shall deliver the Deposit to the Title Company . . ."). And it knew or should have known that by creating the fiduciary relationship with Fort Pierce, a Utah resident, it could be held liable to Fort Pierce in Utah in the event it breached any escrow instructions or otherwise failed to exercise ordinary skill and diligence in any aspect of its employment as the escrow agent. See PALOMAR, § 20:3, at 20-6.

At its core, the Due Process Clause protects foreign entities from being haled into foreign jurisdictions based on "random," "fortuitous," or "attenuated" contacts. See Burger King Corp., 471 U.S. at 480. There is nothing random, fortuitous, or attenuated about Closing Resources contacts with and obligations to the state of Utah. To the contrary, under these circumstances, Closing Resources can hardly be surprised when Fort Pierce hales it into a Utah court after it not only fails to adhere to Fort Pierce's demands to release the deposit pursuant to the Agreement but also threatens to release it to ST Paper, the defaulting party. See, e.g., SII MegaDiamond, Inc., 969 P.2d at 435-36 ("any nonresident business that confirms that it intends to act as a national and international distributor for a Utah business and then places hundreds of purchase orders for goods that are to be shipped and invoiced from Utah, with full knowledge that it must perform its part of the bargain by paying for the goods in Utah[,] should not be surprised when it gets haled into court after it fails to pay no fewer than 170 invoices."). Closing Resources' contacts with Utah simply do not qualify as random, fortuitous, or attenuated contact deserving of protection under the Due Process Clause and the trial court was wrong in allowing Closing Resources to escape its jurisdiction on such grounds.

Because Closing Resources had knowledge that its acts could injure Fort Pierce in Utah, Utah can and should exercise jurisdiction over Closing Resources. See Calder v. Jones, 465 U.S. 783, 785-87 (1984), accord Fenn, 2006 UT 8 at ¶14.

3. There is a forum selection clause specifying Washington County, Utah as the exclusive forum for disputes arising under the Agreement.

Finally, the Agreement itself contained a forum selection clause, which provides: "This Agreement shall be construed under the laws of the State of Utah in effect at the time of the signing of this Agreement. The parties consent to the jurisdiction of the Fifth Judicial District Court in Washington County, Utah." Agreement § 13.5. In Phone Directories Co., Inc. v. Henderson, 2000 UT 64, 8 P.3d 256, the Utah Supreme Court held that:

> while a forum selection/consent-to-jurisdiction clause by itself is not sufficient to confer personal jurisdiction over a defendant as a matter of law, such clauses do create a presumption in favor of jurisdiction and will be upheld as fair and reasonable so long as there is a rational nexus between the forum selected and/or consented to, and either the parties to the contract or the transactions that are the subject matter of the contract.

Id. at ¶14.

As set forth above, the Agreement contained the escrow instructions. And, again, although Closing Resources did not actually sign the Agreement, as a matter of law, its acceptance of the escrow instructions contained within the Agreement created a contract between it and its principals—Fort Pierce and ST Paper. The selection of Utah as the forum for disputes under the Agreement certainly has a rational nexus to the transaction that is the subject of the transaction—the sale of property in Utah. At the very least, Closing Resources, by its silence on the subject, fairly can be said to have given its implied consent to the jurisdiction of the Fifth District Court. Cf. Burger King Corp., 471 U.S. at 472 n.14 (noting that "because the personal jurisdiction requirement is a waivable

right, there are a variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court.") (quotation and citation omitted).

If Closing Resources did not want to subject itself to the jurisdiction of Utah's courts on this transaction, it should not have agreed to serve as the escrow agent, or, at a minimum, should have objected to that term when it accepted the Agreement. The trial court apparently grounded its decision in the rationale that Closing Resources did not have a choice. [R. 191 Tr. 8:12-18 (stating "what was [Closing Resources'] choice? . . . receive it in the mail then do what, throw it out the window? Burn it? . . . It's got Utah jurisdiction dripping on it. We have to get rid of it somehow?").] But this rationale is flawed. Closing Resources absolutely had a choice. It could have sent the deposit and Agreement back to the parties. It did not. If it desired to serve as escrow agent but did not want to be haled into Utah, it could have and should have attempted to negotiate for a non-Utah forum in relation to claims that might be asserted against it as escrow agent. See, e.g., Lee, 2004 UT App 260 at ¶14 n.6 (suggesting that a foreign resident "could have contracted for a non-Utah forum if it desired to avoid the potential of litigation in Utah."). It did not, and its effort to object to jurisdiction only after Fort Pierce filed its suit should be rejected as too late.

In sum, Closing Resources voluntarily agreed to be a party to this transaction and now, faced with the specter of defending itself in Utah, it cannot wield the Due Process Clause as a shield to avoid the obligations that it voluntarily assumed. See Burger King

Corp., 471 U.S. at 474 (stating "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.").

C. Exercise of Jurisdiction is Reasonable and Comports with Traditional Notions of Fair Play and Substantial Justice.

The only remaining question is whether exercising jurisdiction would be consistent with notions of "fair play and substantial justice." Pohl, Inc., 2008 UT 89 at ¶23. The answer is yes. In Burger King Corp., the United States Supreme Court explained that "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." 471 U.S. at 473. Here, the trial court has jurisdiction over the other parties to the suit, Fort Pierce and ST Paper, and will be called upon to address the competing claims of breach that Fort Pierce and ST Paper have lodged against one another—both claiming entitlement to the deposit that (so far as Fort Pierce knows) Closing Resources is still holding.[6] Those competing claims will be tried in Washington County. It makes no sense at all to require Fort Pierce to travel across the country to file an action in Maryland simply to protect the deposit that was placed in Closing Resources' custody, thereby litigating the same claims in two forums.

The Supreme Court also explained that where individuals purposefully derive benefits from interstate activities, as Closing Resources did here, "it may well be unfair to allow them to escape having to account in other States for consequences that arise

[6] ST Paper has asserted counterclaims against Fort Pierce laying its own claim to the deposit. [R. 56-59.]

proximately from such activities[.]" Id. at 474. Finally, the Court stated that "because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." Id. at 474 (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)).

Closing Resources has not offered a single affidavit or other sworn testimony—nor even argued—that it would be inconvenient or burdensome for it to litigate this case in Utah. There is no reason why it would. The only potential witness for Closing Resources is Cheryl Rose and her emails and affidavit make plain that she knew this was a Utah transaction. Under the facts of this case, there is nothing fundamentally unfair about requiring Closing Resources to come to Utah to defend its actions in this case. It is, after all, holding $80,000 that belongs to Fort Pierce.

Indeed, one wonders why Closing Resources has not simply deposited the funds into court in Utah as it initially indicated it would. Perhaps the answer to this question lies in the fact that Closing Resources' last action in its dealings with its principal Fort Pierce was to threaten to unilaterally release the deposit to ST Paper. Then, after being served with Fort Pierce's lawsuit, a lawsuit that Closing Resources invited, Closing Resources shows up in court represented by the same attorneys as ST Paper—not independent counsel. An independent fiduciary cannot pick sides between two principals, see, e.g., PALOMAR, § 20:3, at 20-4 & n.1 (collecting cases), but, for whatever

reasons, Closing Resources has chosen sides—and it cannot now complain that it would be unfair and burdensome to come to Utah to answer for it.

Accordingly, this Court's exercise of jurisdiction is reasonable and comports with traditional notions of fair play and substantial justice.

CONCLUSION

The trial court's dismissal of Closing Resources should be reversed.

DATED THIS 20 day of May 2009.

DURHAM JONES & PINEGAR, P.C.

BRYAN J. PATTISON
Attorneys for Appellant

CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I, Bryan J. Pattison, certify that on May 20, 2009, I served two (2) copies of Appellant's **BRIEF OF APPELLANT** upon counsel for Appellee in this matter, via first class mail with sufficient postage prepaid, to the following address:

Brett D. Ekins
JONES WALDO HOLBROOK & MCDONOUGH, PC
301 North 200 East, Suite 3A
St. George, UT 84770

BRYAN J. PATTISON

Tab 1

REAL PROPERTY SALE AND PURCHASE AGREEMENT

This is an agreement ("*Agreement*") for the sale and purchase of real property located in the Fort Pierce Industrial Park in St. George, Utah. The date of this Agreement, the parties to this Agreement and certain other terms used in this Agreement are listed following this beginning paragraph. The italicized terms that are in quotation marks are used elsewhere in this Agreement and have the meanings or definitions indicated.

Date:	July 14, 2006
"*Seller*":	Fort Pierce Business Park, L.C., a Utah limited liability company
"*Buyer*":	ST Paper Company, LLC, a Delaware limited liability company
"*Property*":	See Exhibit A attached
"*Price per Acre*":	$90,000.00

Estimated total price: $3,536,370.00

"*Deposit*":	$40,000.00
"*Intended Use*"	The intended use is for a manufacturing and distribution facility.
"*Feasibility Period*"	The period of time commencing on the date indicated above and ending 120 days later.
"*Seller's Realtor*":	Commerce CRG
"*Buyer's Realtor*":	none
"*Title Company*":	Southern Utah Title Company
"*Closing Date*":	November 16, 2006

Number of addenda attached: none

1. Purchase.

1.1 Agreement to Purchase Property. Seller agrees to sell the Property to Buyer and Buyer agrees to purchase the Property from Seller. The total purchase price for the Property (the "*Purchase Price*") shall be determined by the actual number of acres in the Property multiplied by the Price per Acre. The Price per Acre shall be prorated for partial acres. The estimated total price stated above assumes that the Property consists of a certain number of acres. The Purchase Price will be based on the actual number of acres, as determined by the survey referred to in Section 2.1. Anything herein to the contrary notwithstanding, unless this Agreement is terminated previously by Buyer, Seller shall not offer, sell or agree to sell the Property to any party other than Buyer, prior to the date scheduled as the Closing Date.

1.2 Payment of Purchase Price. The Purchase Price shall be paid as follows:

1.2.1. Buyer shall pay the Deposit to Closing Resources, LLC, 50 W. Edmonston Drive, Suite 600, Rockville, Maryland 20852, upon execution of this Agreement. The Deposit shall be made by Buyer's check. All interest earned on the Deposit shall accrue to and be the property of Buyer. This Agreement when signed by Buyer and Seller shall also constitute Escrow Instructions to the Title Company and to Closing Resources, LLC. If any requirements relating to the duties or obligations of the Title Company or Closing Resources, LLC, are unacceptable to either of these entities, or if either of these entities requires additional instructions, the parties agree to make any deletions, substitutions and additions as counsel for Buyer and Seller shall mutually approve and which do not materially alter the terms of this Agreement. Any supplemental instructions shall be signed only as an accommodation to Title Company or Closing Resources, LLC, as the case may be, and shall not be deemed to modify or amend the rights of Buyer and Seller, as between Buyer and Seller, unless these supplemental instructions expressly so provide.

1.2.2. The balance of the Purchase Price (*e.g.* the Purchase Price less the Deposit) shall be delivered to Title Company on or before the Closing as provided in Section 6.3, and shall be in immediately available funds.

1.3. Special Limitations on Sale and Purchase. Buyer acknowledges and agrees that the sale and purchase of the Property is subject to the following limitations, in addition to any other limitations contained in this Agreement:

1.3.1. the State of Utah (the "State") will reserve from the Property all coal and other mineral deposits, along with the right for the State, its assigns and other persons authorized by the State to prospect for, mine and remove deposits;

1.3.2. the Property is subject to any valid, existing rights-of-way of any kind and to any right, interest, reservation or exception appearing of record;

1.3.3. the Property is subject to all rights-of-way for ditches, tunnels, and telephone transmission lines that have been or may be constructed by the United States as provided by statute;

1.3.4. the Property will be conveyed to Buyer by Patent issued by the State. Buyer acknowledges that the Patent is without warranties as to the condition of title to the Property; and

1.3.5. all transactions under this Agreement are subject to the rules of the Utah School and Institutional Trust Lands Administration and no sale is final and no rights in the Property, including rights of possession, shall vest in Buyer until final execution and delivery of the Certificate of Sale (as provided in Section 6.1).

2. Survey; Declaration of Covenants; Option.

2.1. Survey. Seller shall provide Buyer a boundary survey of the Property, with all corners staked on the Property, within ten (10) days of the date of this Agreement. Buyer may, at its own cost, obtain an ALTA survey of the Property.

2.2. Declaration of Covenants. The Property is subject to the Declaration of Covenants, Conditions and Restrictions of Fort Pierce Industrial Park Phases II, III and IV, as amended (the "*Declaration*"), which was recorded in the office of the Washington County Recorder. Among other things, the Declaration permits the Declarant under the Declaration to prepare and record one or more plats designating ownership of the various lots in Fort Pierce Industrial Park and obligates each owner of property in Fort Pierce Industrial Park to give written consent to the preparation and recording of said plat(s).

2.3. Option. Buyer acknowledges that a primary purpose for the establishment of Fort Pierce Industrial Park is to encourage and promote economic development in Washington County. In order to accomplish that purpose, Buyer further acknowledges that Seller is entitled to place reasonable restrictions and obligations on the Property that will encourage development of

the Property while, at the same time, discourage holding of the Property for speculation. To that end, Buyer covenants and agrees as follows:

2.3.1. Within two (2) months of the Closing Date, Buyer agrees to submit to the Board of Trustees of the Fort Pierce Industrial Park Phase II, III & IV Owners Association the plans and other materials described in Section 5.1 of the Declaration for the construction of all facilities necessary for the Intended Use (the "*Facilities*").

2.3.2. Buyer shall commence construction of the Facilities within two (2) years of the Closing Date and shall complete construction of the Facilities within four (4) years of the Closing Date.

2.3.3. No material portion (more than ten percent (10%)) of the Property shall be used for any purpose other than the Intended Use within five (5) years of the Closing Date.

In the event Buyer fails to comply with any of the foregoing covenants, Seller may give to Buyer a notice of default. In the case of Sections 2.3.1 and 2.3.2, the notice of default shall be given no later that ninety (90) days following the end of the applicable time period indicated. In the case of Section 2.3.3, the notice of default shall be given during the five-year time period. If Buyer fails to cure the default within thirty (30) days of the date the notice is given, Seller shall, at its discretion, have the option and right to buy back the Property (including all improvements on the Property) for the Purchase Price. Notice of exercise of the option shall be given to Buyer no later than ninety (90) days following the date the notice of default is given. Closing shall take place at the office of the Title Company within thirty (30) days of the date the notice of exercise is given. If the notice of exercise is not timely given, the right to buy back the Property for the default cited shall expire at the end of that ninety-day period. In the event Seller shall re-purchase the Property, Seller shall be responsible for all closing costs assessed by the Title Company. Buyer shall convey the Property to Seller by special warranty deed, free of any lien, encumbrance or exception to title placed on the Property subsequent to the Closing (defined below). A notice of this option shall be executed by Seller and Buyer at the Closing and shall be recorded by the Title Company at the office of the Washington County Recorder at the same time that the Patent is recorded.

3. Conditions Precedent to Buyer's Performance. Buyer's obligation to purchase the Property is subject to the satisfaction of all the conditions set forth below, each of which is for Buyer's benefit, within the time period specified. Buyer may waive any condition in writing.

3.1. Feasibility. Buyer shall have until 5:00 p.m. on the last date of the Feasibility Period to determine in its sole discretion whether it is feasible

to acquire and develop the Property. During the Feasibility Period, Buyer shall review and approve title as evidenced by a current preliminary title report (the "*Preliminary Report*") to be issued by Title Company and shall review the physical condition of the Property, its suitability for building and development and its municipal zoning classification. If Buyer determines that it is not feasible to acquire and develop the Property, it may terminate this Agreement by giving written notice to Seller and Closing Resources, LLC, before the end of the Feasibility Period, in which event the Deposit shall be returned to Buyer and Buyer and Seller shall be relieved for all further obligations under this Agreement, with the exception of any repair and restoration obligations which Buyer may have under Section 9. If Buyer fails to give such notice before the end of the Feasibility Period, this feasibility condition shall be deemed satisfied and, except as provided in Section 5.3, the Deposit shall become nonrefundable.

3.2. Delivery of Documents. Seller shall have signed, acknowledged and delivered all documents and instruments to the Title Company as required in Section 6.

3.3. Validity of Representations and Warranties. All representations and warranties by Seller in this Agreement, or in any other written statement from Seller that is delivered to Buyer under this Agreement, shall be true as of the Closing as though made at that time.

3.4. No Defaults by Seller. Seller shall not be in default under this Agreement as of the Closing.

4. Conditions Precedent to Seller's Performance. The obligation of Seller to sell the Property is subject to the satisfaction of all conditions set forth below, each of which is for Seller's benefit, within the time period specified. Seller may waive any condition in writing.

4.1. Delivery of Documents. Buyer shall have signed, acknowledged and delivered all monies, documents and instruments to the Title Company as required in Section 6.

4.2. Validity of Representations and Warranties. All representations and warranties by Buyer in this Agreement, or in any other written statement from Buyer that is delivered to Seller under this Agreement, shall be true as of the Closing as though made at that time.

4.3. No Defaults by Buyer. Buyer shall not be in default under this Agreement as of the Closing.

5. Termination of Agreement.

5.1. In addition to Buyer's right to terminate under Section 3.1, if either Buyer or Seller disapproves any condition referred to in Section 3 or 4, respectively (other than the condition referred to in Section 3.1), that party may terminate this Agreement by delivering written notice to the other party and to the Title Company and to Closing Resources, LLC, on or before the Closing Date.

5.2. If this Agreement is properly terminated by Seller as provided in Section 5.1, Closing Resources, LLC, shall pay the Deposit to Seller and the Title Company shall return all other funds and documents then held by it to the party depositing the funds and documents.

5.3. If this Agreement is properly terminated by Buyer as provided in Section 5.1, the Title Company and Closing Resources, LLC, shall return all funds and documents then held by them (including without limitation the Deposit) to the party depositing the funds and documents.

5.4. Termination of this Agreement, as provided in this Section 5, shall be without prejudice to whatever legal rights Buyer or Seller may have against each other arising from this Agreement.

5.5. If the Closing fails to occur because of either party's default, the defaulting part shall be liable for all escrow cancellation and Title Company charges. If the Closing fails to occur for any other reason, Buyer shall pay any escrow cancellation and/or Title Company charges.

5.6. If Buyer defaults under this Agreement, Seller may elect either to receive the Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Agreement or pursue other remedies available at law. If Seller defaults, in addition to return of the Deposit, Buyer may elect either to accept from Seller a sum equal to the Deposit as liquidated damages, or may sue Seller to specifically enforce this Agreement or pursue other remedies available at law. If Seller elects to accept liquidated damages, Closing Resources, LLC, shall surrender the Deposit to Seller upon demand. If Buyer elects to accept liquidated damages, Closing Resources, LLC, shall surrender the Deposit to Buyer upon demand and Seller shall pay the liquidated damages to Buyer upon demand. IT IS EXPRESSLY UNDERSTOOD AND AGREED BY THE PARTIES THAT THE DEPOSIT AMOUNT IS A REASONABLE ESTIMATE OF THE EXTENT TO WHICH EITHER PARTY WOULD BE DAMAGED BY THE OTHER'S DEFAULT, IN LIGHT OF THE DIFFICULTY THE PARTIES WOULD HAVE IN DETERMINING ACTUAL DAMAGES AS A RESULT OF SUCH A DEFAULT.

6. Closing. The closing of the transactions contemplated herein (the "*Closing*") shall take place on the Closing Date or such earlier date as the parties may agree. The place of the Closing shall be at the office of the Title Company. At the Closing the following shall occur:

6.1. Seller shall deliver to the Title Company a Certificate of Sale to the Property duly executed on behalf of the State of Utah. Buyer acknowledges that the Certificate of Sale is without warranties as to the condition of title to the Property.

6.2. Seller and Buyer shall each execute and deliver to the Title Company a closing statement for the sale and purchase reflecting the following adjustments, payments, and credits:

6.2.1. Seller shall pay the premiums for a standard form owner's protection policy of title insurance issued through the Title Company in an amount equal to the Purchase Price, naming Buyer as the insured and insuring that title to the Property is vested in Buyer, subject only to the exceptions in the Preliminary Report and the matters referred to in Section 1.3 (the "*Title Policy*"). If Buyer requires an ALTA extended policy of title insurance, (i) Buyer shall make such selection in a timely manner so as to not interfere with or delay the Closing, (ii) Seller shall pay the base cost of an owner's policy, and (iii) Buyer shall pay the additional cost of obtaining such ALTA extended policy including, without limitation, any survey costs.

6.2.2. Buyer and Seller shall each pay one-half (½) of the costs of the escrow service fees charged by the Title Company. Seller and Buyer shall each pay one-half (½) of the recording fees and similar charges and expenses. Buyer shall pay all charges assessed by Closing Resources, LLC.

6.2.3. The Property is currently exempt from property taxes. Buyer shall be responsible for all property taxes assessed against the Property after the Closing.

6.3. Closing Resources, LLC, shall deliver the Deposit to the Title Company, and Buyer shall deliver to the Title Company immediately available funds in the amount of the Purchase Price, less the Deposit, together with sufficient funds to pay Buyer's allocation of the expenses stated in Buyer's closing statement.

6.4. Buyer and Seller shall each execute, acknowledge, and deliver such other documents and instruments and take such other action as the Title Company may reasonably require in order to document and carry out the transaction contemplated in this Agreement.

6.5. Upon receipt of the above funds and documents, the Title Company shall disburse the funds as provided in the closing statements and shall deliver the Certificate of Sale to Buyer.

6.6. Possession of the Property shall be delivered to the Buyer at the Closing. All warranties and representations of Seller and Buyer, and any covenants and obligations of the parties hereunder which remain unperformed upon Closing, shall survive the Closing.

7. Patent and Title Insurance. When the Patent has been issued by the State of Utah, Seller shall deliver the Patent to the Title Company for recording. The Title Company shall then issue the Title Policy to Buyer.

8. Representations, Warranties and Covenants.

8.1. Seller. In addition to any other representations and warranties contained in this Agreement, Seller makes the following representations and warranties, each of which (i) is material and is being relied upon by Buyer, and (ii) is true in all respects as of the date of this Agreement, and shall be true in all respects as of the Closing Date and (iii) shall survive the Closing and delivery of the Patent.

8.1.1. All documents executed by Seller that are to be delivered to Buyer at Closing are, and at the Closing will be, duly authorized, executed and delivered by the Seller; are, and at the Closing will be, legal, valid, and binding obligations of Seller; and do not, and at the Closing will not, breach, violate, or conflict with any provisions of any agreement to which Seller is a party or to which it is subject.

8.1.2. Except as provided in the Declaration and except as disclosed to the Buyer in writing within five days after the date of this Agreement, to the best of Seller's knowledge, there are no condemnation, zoning, or other land-use regulation proceedings, either instituted or planned to be instituted, which would detrimentally affect the development, use and operation of the Property for its Intended Use, nor has Seller received notice of any special assessment proceedings.

8.1.3. Seller is not involved in, nor is Seller aware of, any proceeding or threatened litigation, administrative or governmental proceeding or investigation, or pending or threatened condemnation or eminent domain proceeding, relating to or otherwise affecting the Property.

8.1.4. Seller is not aware of, and has not conducted any studies with respect to, any Hazardous Materials located below, upon, about or beneath the Property. The term "Hazardous Materials" means any

material, substance, waste, chemical, item or component (i) the presence of which requires investigation or remediation under any federal, state or local statute, regulation, ordinance or policy; or (ii) which is defined as "hazardous waste" or "hazardous substance" under any federal, state or local statute, regulation or ordinance, including without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. Section 9601 et seq.) and the Federal Resource Conservation and Recovery Act (42 U.S.C. Section 6901 et seq.) and amendments thereto and regulations promulgated thereunder; or (iii) which is toxic, explosive or corrosive and is regulated by any federal, state or local governmental authority; or (iv) the presence of which on the Property could constitute a nuisance upon the Property or to adjacent property; or (v) which contains polychlorinated biphenyls (PCBs), asbestos or urea formaldehyde; or (vi) which contains oil, petroleum, including crude oil or a fraction thereof, natural gas, natural gas liquids, liquified natural gas, synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas), radon gas, ash produced by a resource recovery facility utilizing a municipal solid waste stream or drilling fluids and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources.

8.2. Buyer. Buyer represents and warrants that the signing of this Agreement, its delivery by Buyer to Seller, Buyer's performance and the transactions contemplated in this Agreement have been duly authorized by the requisite action on the part of Buyer, and constitute valid and binding obligations of Buyer, enforceable under the terms of this Agreement. This representation and warranty (i) is material and is being relied upon by Seller, (ii) is true in all respects as of the date of this Agreement and shall be true in all respects as of the Closing Date and (iii) shall survive the Closing and delivery of the Patent.

9. Entry on Property. Until the Closing or until this Agreement is terminated, Buyer and Buyer's employees and agents shall have a limited license to enter upon the Property to fully investigate the Property, including conducting engineering studies and soils and compaction tests and testing for Hazardous Materials and other substances, so long as the activities do not materially damage the Property. Buyer shall be entitled to hire consultants, engineers or other third parties at its own expense to complete such studies and tests, provided Buyer first delivers to Seller a waiver signed by each such third party waiving any right to file a lien against the Property for that third party's charges. Buyer shall indemnify Seller from and against any liability and damage arising from Buyer's entry and shall repair any damage that may have been caused to the Property.

10. As-Is Purchase. Except as set forth in Section 8.1 above, Buyer acknowledges that Seller makes no representations or warranties express or

implied with respect to the Property, and Buyer further acknowledges that Buyer is purchasing the Property on an **"AS-IS"** basis.

11. Real Estate Brokerage Commission. Buyer and Seller each represents and warrants to the other that it has had no dealings with any real estate broker or agent in connection with the negotiation of this Agreement or the consummation of the purchase and sale contemplated herein other than its respective broker named on the first page of this Agreement. Seller shall pay all brokerage commissions due Seller's Realtor by reason of this transaction. Buyer shall pay all brokerage commissions due Buyer's Realtor by reason of this transaction. Buyer and Seller do each hereby agree to indemnify and hold the other harmless from and against any cost, expenses or liability which may be claimed by any real estate broker or agent as a result of the acts or dealings of the indemnifying party.

12. Attorneys' Fees. Should any party default in any of the covenants or agreements herein contained, that defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise. This obligation of the defaulting party to pay costs and expenses includes, without limitation, all costs and expenses, including a reasonable attorney's fee, incurred on appeal and in bankruptcy proceedings.

13. General Provisions.

13.1. Entire Agreement and Amendment. This Agreement, including the addenda, if any, constitutes the entire agreement between the parties hereto relative to the subject matter hereof. Any prior negotiations, correspondence, or understandings relative to the subject matter hereof shall be deemed to be merged in this Agreement and shall be of no force or effect. This Agreement may not be amended or modified except in writing executed by both of the parties hereto.

13.2. Notices. All notices or communications to be given under this Agreement shall be given in writing and shall be deemed given when hand delivered or when deposited in the mail to the address shown below of the party entitled to receive notice, postage prepaid, registered or certified. The address of either party may be changed by written notice to the other party.

13.3. Time of the Essence. Time is of the essence in all provisions of this Agreement.

13.4. Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of Buyer and Seller and their respective heirs,

personal representatives, successors and assigns. This Agreement may not be assigned by Buyer without the prior written consent of Seller, which shall not be unreasonably withheld. If an assignment by Buyer is permitted by Seller, Buyer shall nonetheless remain obligated under the terms of this Agreement for all obligations and covenants of Buyer.

13.5. Applicable Law and Venue. This Agreement shall be construed under the laws of the State of Utah in effect at the time of the signing of this Agreement. The parties consent to the jurisdiction of the Fifth Judicial District Court in Washington County, Utah.

13.6. Interpretation. The section headings contained in this Agreement are for purposes of reference only and shall not limit, expand, or otherwise affect the construction of any provisions of this Agreement. The exhibits and addenda, if any, attached hereto are by this reference incorporated herein and made a part hereof. This Agreement shall not be construed as if it had been prepared by only Buyer or Seller, but rather as if both Buyer and Seller had prepared the same. In the event any portion of this Agreement shall be declared by any court of competent jurisdiction to be invalid, illegal, or unenforceable, such portion shall be deemed severed from this Agreement, and the remaining parts hereof shall remain in full force and effect, as fully as though such invalid, illegal or unenforceable portion had never been part of this Agreement.

IN WITNESS WHEREOF, the Seller and the Buyer have executed duplicate originals of this Agreement as of the day and year first above written.

Buyer:

ST Paper Company, LLC

By: _____
Its: _____

Address:

1555 Glory Road
Green Bay, WI 54304

Seller:

Fort Pierce Business Park, L.C.

By: LGJ, LC, Manager

By: _____
Gilbert M. Jennings
Manager

Address:

335 East St. George Blvd., Suite 301
St. George, Utah 84770

Exhibit A

Description of Property

The parcel known as Lot 56 in the Fort Pierce Industrial Park in St. George, Utah comprised of 39.293 acres and more particularly described in the legal description and drawing attached.

L.R. POPE ENGINEERING INC.
1240 E 100 S #15B
ST. GEORGE, UTAH 84790
1-435-628-1676
email lrpope@infowest.com

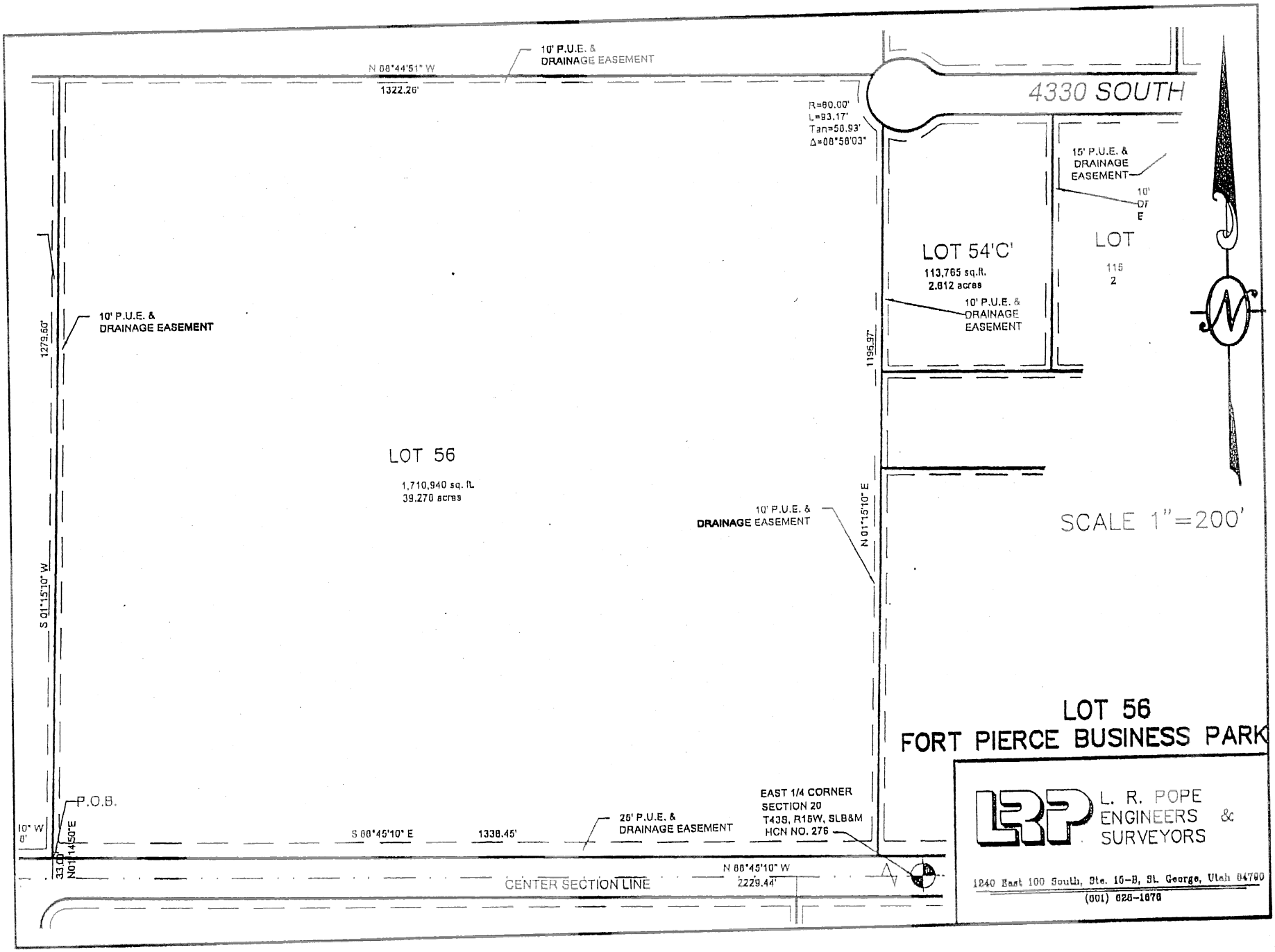
DESCRIPTION OF 39.278 ACRE PARCEL
FOR PROPOSED LOT 56
FORT PIERCE BUSINESS PARK

Beginning at a point North 88°45'10" West 2229.44 feet along the Center Section Line and North 1°14'50" East 33.00 feet from the East 1/4 Corner of Section 20, Township 43 South, Range 15 West, Salt Lake Base and Meridian and running thence South 88°45'10" East 1338.45 feet; thence North 1°15'10" East 1196.97 feet to a point on a 60.00 foot radius curve to the right (bearing to radius point is N 35°39'53" E); thence Northwesterly through a central angle of 88°58'03" and along the arc of said curve 93.17 feet; thence North 88°44'51" West 1322.26 feet; thence South 1°15'10" West 1279.60 feet to the point of beginning.

Containing 39.278 acres

RESERVING UNTO the State of Utah and its assigns: a 25.00 foot wide utilities and drainage easement along the South Boundary line and 10.00 foot wide utilities and drainage easement along the North, East and West Boundary lines.

By L. Ried Pope, PE, PLS


10' P.U.E. &
DRAINAGE EASEMENT
N 88°44'51" W
1322.26'
4330 SOUTH
R=60.00'
L=93.17'
Tan=59.93'
Δ=88°58'03"
15' P.U.E. &
DRAINAGE
EASEMENT
10'
DR
E
LOT 54'C'
113,765 sq.ft.
2.612 acres
LOT
115
2
10' P.U.E. &
DRAINAGE
EASEMENT
10' P.U.E. &
DRAINAGE EASEMENT
1279.60'
1196.97'
LOT 56
1,710,940 sq. ft.
39.270 acres
10' P.U.E. &
DRAINAGE EASEMENT
N 01°15'10" E
S 01°15'10" W
SCALE 1"=200'
LOT 56
FORT PIERCE BUSINESS PARK
P.O.B.
10' W
8'
33.00'
N01°14'50"E
S 88°45'10" E
1338.45'
25' P.U.E. &
DRAINAGE EASEMENT
EAST 1/4 CORNER
SECTION 20
T43S, R15W, SLB&M
HCN NO. 276
CENTER SECTION LINE
N 88°45'10" W
2229.44'
L. R. POPE
ENGINEERS &
SURVEYORS
1240 East 100 South, Ste. 16-B, St. George, Utah 84790
(801) 628-1676

Brett D. Ekins (USB #11472)
JONES WALDO HOLBROOK & McDONOUGH PC
301 North 200 East, Suite 3A
St. George, UT 84770
Telephone: (435) 628-1627
Fax: (435) 628-5225

Attorneys for Defendant
Closing Resources, LLC

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

FORT PIERCE BUSINESS PARK, L.C, a Utah limited liability company Plaintiff, v. ST PAPER COMPANY, LLC, a Delaware limited liability company; and CLOSING RESOURCES, LLC, a Maryland limited liability company, Defendants.	Case No. 080501788 ~~[PROPOSED]~~ ORDER GRANTING CLOSING RESOURCES, LLC'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION Judge Beacham

This matter came before the Court on Defendant Closing Resources, LLC's motion to dismiss for lack of personal jurisdiction on October 22, 2008 at 9:30 a.m. before the Honorable G. Rand Beacham. The Court, having reviewed the pleadings on file herein and good cause appearing, hereby grants Defendant Closing Resources, LLC's motion to dismiss for lack of personal jurisdiction.

DATED this 14 day of Nov., 2008.

BY THE COURT:

G. Rand Beacham

G. Rand Beacham, District Court Judge

Tab 3

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

FORT PIERCE BUSINESS PARK,	)	
Plaintiff,	)	
VS.	)	CASE NO. 080501288
S.T. PAPER COMPANY, LLC, et al.	)	
Defendants	)	

BEFORE THE HONORABLE G. RAND BEACHAM

FIFTH DISTRICT COURT

220 NORTH 200 EAST

ST. GEORGE, UTAH 84770

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION TO DISMISS

OCTOBER 22, 2008

TRANSCRIBED BY: Russel D. Morgan

ORIGINAL

20090491-CA

APPEARANCES

FOR THE PLAINTIFF:

BRYAN J. PATTISON
DURHAM JONES PINEGAR
192 EAST 200 NORTH, 3RD FLR.
ST. GEORGE, UTAH 84770

FOR THE DEFENDANT:

BRETT D. EKINS
JONES, WALDO HOLBROOK & MCDONOUGH
301 N. 200 E., SUITE 3-A
ST. GEORGE, UTAH 84770

October 22, 2008. St. George, Utah.

PROCEEDINGS

THE COURT: Case number six. Fort Pierce Business Park L.C. vs. Saint Paper Company. Is that right? Or S.T. Paper Company and Closing Resources. It was a saint I never heard of. St. Paper. Okay. Let's see, Mr. Pattison? Are you Mr. Ekins?

MR. EKINS: Correct.

THE COURT: So, it's your motion to dismiss on behalf of the closing resources?

MR. EKINS: That's right.

THE COURT: All right. I found a memorandum of support, a memorandum in opposition and a reply. Was there anything else that I should have seen in here?

MR. EKINS: No.

THE COURT: Okay. So, I have read those. Mr. Ekins, anything else you want to say about this?

MR. EKINS: Nothing beyond what I stated in the reply papers. Just emphasizing again the fact that Closing Resources has zero contact with Utah, which is undisputed, other than agreeing to to serve as an escrow agent in this transaction. And I would just again emphasize the administrative nature of the emails, only two of them. And then the letters were sent in the context of the litigation, which had a risk. So, they weren't sent in the context of

the provision of escrow services necessarily. And as I read the case law, that's just not enough for an exercise of personal jurisdiction.

THE COURT: Mr. Pattison.

MR. PATTISON: Your Honor, the one contact they had with the state of Utah is the transaction that is subject to litigation. It's property in Utah. My client's in Utah. They accepted to be escrow agent on a contract with a Utah jurisdictional clause. They are holding $80,000. They are a fiduciary to --

THE COURT: They are not a party to that contract.

MR. PATTISON: Well, their names are throughout the contract. But when they accepted it, if you look at Section 1.21, that also constitutes the written escrow instructions of the parties.

THE COURT: I didn't see any contract. What was that?

MR. PATTISON: Your Honor, that was attached to the complaint. I have a copy of it here if you would like to --

THE COURT: It's attached to what?

MR. PATTISON: I referenced it in our memo. The actual contract itself is attached as copies.

THE COURT: Oh, here. Okay. I do know what you are talking about then.

MR. PATTISON: Right.

THE COURT: I just didn't have my finger on it.

MR. PATTISON: Okay.

THE COURT: One point what, did you say?

MR. PATTISON: 1.21. It's on page 2.

THE COURT: Well, I can see everything else, but I can't see that.

MR. PATTISON: Maybe it's easier if you have it highlighted up there. So, you have 1.21 references Closing Resources. Down further I think it's the third, fourth sentence. "This agreement, when signed, shall constitute escrow instructions to the title company and to Closing Resources."

Going further, paraphrasing, but if anything is unacceptable to Closing Resources then they should say so, essentially. They confirmed they received this contract. Contract goes further in Section 5 to give instructions to Closing Resources what to do with the deposit in the event of a termination. And then in 6.3 directs Closing Resources what to do with the funds when a transaction closes.

The case law we have cited in our memo, (inaudible) case is that once they accepted to be escrow they assumed a fiduciary responsibility to my client, a Utah corporation in a Utah transaction. That's what this case is about. It's about who is entitled to the deposit they are holding. Initially, I think the position we can't do anything because

there is a dispute. We'll just deposit it into court and we'll sue each other, which is essentially --

THE COURT: Generally what escrow companies do, isn't it?

MR. PATTISON: Right. Then they came back, we filed suit. I don't think we yet had them served. They came back. And this is Exhibit -- one of the exhibits to our motion. They came back with a letter, Exhibit 4, basically saying we don't want to be escrow agent any more, so we are going to give this money to S.T. or -- yeah, S.T. Paper. And so, that's a blatant, in my view, violation of fiduciary responsibility to us. Then they show up into court on a motion to dismiss represented by the same attorney as S.T. Paper where they have the fiduciary to both of us. So, everything that's --

THE COURT: What is there from Closing Resources that documents their agreement to do anything?

MR. PATTISON: They accepted the deposit and the correspondence.

THE COURT: What evidence is there of that?

MR. PATTISON: The emails that they sent to Chris Angstrom of my office. That's attached. We have Mr. Angstrom's affidavit. They accepted the deposit and the agreements. That's documented. Those are the emails Mr. Ekins was talking about. So, they accepted it. They

accepted the contract. They never did anything to say we don't want to be escrow agent any more. We don't like these terms. They took the deposit. They took the agreement. Those are the instructions. Now, they are trying to give the money away. If they don't want to be hailed into Utah they shouldn't have agreed to be escrow agent.

THE COURT: Again, what do you have that indicates that they did agree to be hailed into Utah?

MR. PATTISON: The fact that they accepted the deposit, Your Honor. They accepted the --

THE COURT: If I send off an order for Vermont for maple syrup, and I send my check to Vermont and they accept it, I can sue them in Utah?

MR. PATTISON: No. This is much different. They created a fiduciary responsibility. That's just a one time business transaction.

THE COURT: Where is the documentation of that?

MR. PATTISON: I'm sorry?

THE COURT: Where is the documentation of that? Are there escrow instructions?

MR. PATTISON: That's the agreement. That's what we just went over.

THE COURT: Yeah. But they are not a party to the agreement.

MR. PATTISON: Escrow instructions, they don't have

to sign separately on escrow instructions. Escrow instructions can be oral. They can be written. They can be in a letter.

THE COURT: If you want them to be bound you ought to be having them sign an escrow instruction. I would never do a real estate agreement like this without having the escrow company agree specifically to specific terms.

MR. PATTISON: When they accepted the deposit and they accepted the agreement, they held the funds pursuant to the agreement. There is no other agreement in place. That was the agreement. They were holding the funds.

THE COURT: So, what was their choice?

MR. PATTISON: Their choice was not to do anything.

THE COURT: They receive it in the mail then do what, throw it out the window? Burn it?

MR. PATTISON: No. Their choice was --

THE COURT: It's got Utah jurisdiction dripping on it. We have to get rid of this somehow?

MR. PATTISON: Their choice was not to be part of the Utah transaction, Your Honor. They had a choice.

THE COURT: Well, what they are doing has nothing to do with Utah.

MR. PATTISON: Sure it does. The transaction is in Utah.

THE COURT: It has no more to do with Utah than it

has to do with Alaska other than that's just a name on a paper. For jurisdiction in Utah you have to have something other than somebody in Utah sent me something.

MR. PATTISON: We do. We have -- we are not just talking about throwing an email out there, exchanging a letter with someone. We are talking about creating a fiduciary responsibility with a Utah company and a Utah transaction. Property in Utah. Everything here is in Utah. They agreed to become escrow agent, when they took the deposit, confirmed receipt of the deposit and the agreement, which is the escrow instructions for this specific transaction. We are not arguing general jurisdiction. This is specific jurisdiction. They have availed themselves. They have contracted. They were doing business in Utah.

THE COURT: Oh, hold on now. What business did they do in Utah?

MR. PATTISON: They are operating as the escrow agent on this transaction.

THE COURT: They have never been to Utah.

MR. PATTISON: That's not the test though, Your Honor.

THE COURT: Well, certainly, the test is not that one becomes subject to a foreign state's jurisdiction just by receiving something and agreeing to do in their own facility in another state some service that happens to be for somebody

in Utah.

MR. PATTISON: That's foreseeable that when they create -- here's the standard out of the Fan [phonetic] case that we have cited. It's foreseeable that when they created this fiduciary relationship -- they don't argue there is no fiduciary relationship with my client.

THE COURT: Right.

MR. PATTISON: It's foreseeable. If they do something that causes harm to my client that they can be hailed into Utah. That's foreseeable.

THE COURT: Why?

MR. PATTISON: Because my client's a Utah company. This is a Utah transaction. They are holding a deposit.

THE COURT: When I travel to Europe, that doesn't mean I take Utah jurisdiction with me. If somebody in Europe harms me, that I can go back home and sue them there. When I send my check to a Vermont maple syrup provider, and they say, well, geez, this guy's in Utah. The check's from Utah. Man, I think we are going to get sued in Utah. No. No. If there is something wrong with the maple syrup then I better go where the maple syrup came from. I'm just not seeing it.

MR. PATTISON: Well, when they created that fiduciary duty to my client on this transaction foreseeable --

THE COURT: The existence of a fiduciary duty is not enough to transfer jurisdiction. The existence of a

fiduciary duty is consistent with either jurisdiction in Utah or wherever in the world it is that Closing Resources is located. So, the existence of a fiduciary duty is not enough for jurisdictional purposes. You have to have Closing Resources actually doing something that invokes Utah law, that has something to do with Utah that has something other than we are sitting in our business, we are doing what we always do. Presumably with people from all over the place. What in the world is there that makes Closing Resources think they have to go to Utah to litigate if somebody in Utah complains about the escrow?

MR. PATTISON: It's not just --

THE COURT: Otherwise, you would have absolutely no interstate escrow agents. None. Because they would be at the risk of having to litigate in 51 jurisdictions for what they do at their home office wherever that is.

MR. PATTISON: Your Honor, it's not just someone in Utah. It's their principal. It's their fiduciary.

THE COURT: But that doesn't distinguish it from their principal or fiduciary in Alaska and the one in Florida and the one in South Carolina and the one in New Mexico. And all these transactions that they might do doesn't mean that they should expect to be able to be sued from every one of those states. Not to me, it doesn't. That's just stretching it. That's conferring jurisdiction on the basis of what your

client did rather than on the basis of what Closing Resources did. And I don't think jurisdiction is something that's sort of like the playground, You are it. You know, I was from Utah. I reached out and touched you, wherever Closing Resources is now. Now you are Utah. I just don't see it that way.

Anything else? See, this is why I was asking are there any written closing instructions where Closing Resources said, okay. We received the closing instructions. We understand this is what we are supposed to do. We agree with Mr. So and So in Utah that this is what we were supposed to do?

MR. PATTISON: Your Honor, what we presented were their emails saying, yes, we received these closing instructions. Those emails to our office in Utah, I believe they probably also corresponded with S.T. Paper's attorneys at Jones Waldo. We have received it. We've received the deposit. We've received the agreement, which is the escrow instructions. There is nothing else for them to do. They could have said we got this stuff. We are sending it back. We don't want any part of this transaction. But they didn't. So, that's what this case is about, who is entitled to the deposit they are holding. It's a case between their principals.

THE COURT: But didn't you say they gave it back to

S.T.?

MR. PATTISON: No. That's what they are threatening to do. They initially said we'll just tender it into court. Then they sent a follow-up letter saying, you know, we are sick of this. We don't want to be escrow agent. We are just going to give it to S.T. Paper. And how they figured that out, when there is a dispute, that's all this case is about is a dispute about the 80,000. For them to just give it to S.T. Paper for no reason creates foreseeable harm to their fiduciary in Utah.

THE COURT: That's what closing instructions would do. They would instruct Closing Resources and get Closing Resources agreement that in the event of A, this is what you do, in the event of B, this is what you do.

MR. PATTISON: That's what --

THE COURT: Then Closing Resources could agree with that.

MR. PATTISON: That's what they do with article five.

THE COURT: Article five is an agreement, is not a --

MR. PATTISON: Section 5. As I said, the law isn't that they have to sign off on it. The law is they accept the deposit. Escrow instruction ought to be written. They don't have to be separately signed to be bound. The simple act of accepting the deposit along with this agreement constitutes acceptance of the terms of the agreement.

THE COURT: Okay. Well, you might be able to convince an appellate court of that, but I'm just not convinced, Mr. Pattison. I think that in the kind of commercial environment that we have in the world, I think it would throw more than cold water. I think it would ice things to have people who want to do interstate business, particularly of a service that requires no movement on their part, no appearance any place else on their part, simply to be in one location and to do a service from that one location, to tell them you either do it within the state of Maryland or you can be sued any place or anything that comes to your property. I just don't think that's consistent with the way the business world works now days. I think there's got to be more than that to subject them to Utah jurisdiction. Particularly where, at least from the evidence I have seen, they didn't go out trolling for business and say, please, Fort Pierce Business Park, send us some business.

MR. PATTISON: My understanding on that, and Mr. Ekins can correct me if I'm wrong, is that we initially wanted everything to be held at Southern Utah Title. And it was S.T. Paper who I understand has done business with Closing Resources before that required them to be the escrow agent on the deposit.

THE COURT: Where is S.T. Paper located? Where is

their --

MR. PATTISON: S.T. Paper, I believe, is Wisconsin, Your Honor. And they may have offices elsewhere. I don't know. So, it wasn't our choice to use them. It was the other side's choice.

THE COURT: Yeah. So, your client conceded to that for whatever bargaining reason they had?

MR. PATTISON: Yes. I wasn't involved.

THE COURT: Well, the other part if it is, it's not like your client doesn't have any place where they can go to Closing Resources. Just seems to me they ought to have to go to Closing Resources where Closing Resources is rather than do one transaction with a foreign corporation and expect them to come here.

MR. PATTISON: Right. And I understand that. In the context of the concern of the parties, the litigation is here. That requires my client, the Utah company, to go elsewhere, litigate the case twice, basically, taking witnesses and everything else with them. I mean, that's another thing we have argued in our memo. This is where the litigation is. This is where it's most convenient. It's foreseeable, therefore --

THE COURT: Only for your client. It's not foreseeable for Closing Resources.

MR. PATTISON: That's what S.T. Paper agreed to as

well.

THE COURT: Yeah. I don't think that two emails and two letters regarding escrow held in Maryland constitute conducting business in Utah or even minimum contact. But, like I said, you know, appellate court might think (inaudible).

MR. PATTISON: Along those lines is, we request to get a certification of this issue under 54B so we don't --

THE COURT: Sure.

MR. PATTISON: -- we can get some type of direction on that.

THE COURT: Sure. It would be fine to do that. I'm going to grant the motion to dismiss for lack of jurisdiction as discussed. And, certainly, I'll make certification so that you could get that taken care of, see if you can get that here.

MR. PATTISON: Thank you, Your Honor.

THE COURT: Now, those kinds of things aside, why is it such a problem --

MR. PATTISON: Because they are --

THE COURT: -- about who Closing Resources should hand the money over to?

MR. PATTISON: Because I don't know whether we are going to see that money again. The underlying litigation, this transaction fell apart. There is a dispute about whose

fault it was, therefore, who is entitled to the 80,000 that they are holding.

THE COURT: Right.

MR. PATTISON: If they disgorge that money to S.T. Paper, we ultimately prevail. We have to chase this out of state.

THE COURT: Why don't you just let Closing Resources pay it into court or pay it into escrow with some really good instructions?

MR. PATTISON: I wish they would do that, Your Honor. I suggest they do that in my memo. And they filed a motion. They don't want to do that for some reason. I suspect it's because they do business with S.T. Paper. So, I don't have a problem with them doing that. I said in my memo if they deposit it into court, I would cut them loose.

THE COURT: So, Mr. Ekins, why doesn't your client just resolve this instead of arguing about jurisdiction?

MR. EKINS: Well, they very well may be willing to. When we were named in the complaint, the instant response of the client was let's get this dismissed based on personal jurisdiction grounds. Now that that's happened, I think we are certainly willing to discuss options such as paying the money into court and seeing what happens. Because, again, this dispute has nothing to do with Closing Resources. I mean --

THE COURT: Yeah. If it's just a matter of who is going to hold the money for the litigation between the primary monies, I can think of all kinds of ways to solve that one.

MR. EKINS: Right. I think we should be able to work something out. Now we are dismissed as a party I think we may be able to do that.

THE COURT: Shoot. I can give you my bank account number. I'll get my half of a percent interest a year on it.

MR. PATTISON: That's better than most are getting.

THE COURT: Well, okay. Yeah. I just always want to take a look at all the problems and see if we can (inaudible). And where it's just holding money --

MR. PATTISON: That's why we were surprised by the motion. That's what we thought it would do. We are looking for the complaint from them. It's just an order at the end of the day who they are going to give that money to. At least, at the point in time we filed it. That's all we ever wanted from them. And that's what we suggested in our opposition.

THE COURT: I can see if Closing Resources offered to pay the money into court in Utah that would be an acknowledgment of jurisdiction in Utah perhaps. So --

MR. PATTISON: Of course, at that point, we wouldn't (inaudible) dismiss them anyway.

THE COURT: Yeah. Okay. Well, good luck with that.

MR. PATTISON: Thank you, Your Honor.

THE COURT: Oh, here's your copy.

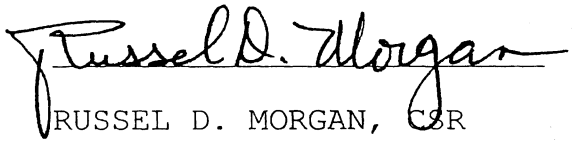
CERTIFICATE

STATE OF UTAH

COUNTY OF WASHINGTON

THIS IS TO CERTIFY THAT THE FOREGOING PROCEEDINGS WERE TAKEN BEFORE ME, RUSSEL D. MORGAN, A CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH, RESIDING AT WASHINGTON COUNTY, UTAH;

THAT THE PROCEEDINGS WERE TAKEN BY ME IN STENOTYPE FROM AN ELECTRONIC RECORDING, AND THEREAFTER CAUSED BY ME TO BE TRANSCRIBED INTO TYPEWRITING, AND THAT A TRUE AND CORRECT TRANSCRIPTION OF SAID TESTIMONY SO TAKEN AND TRANSCRIBED TO THE BEST OF MY ABILITY IS SET FORTH IN THE FOREGOING PAGES NUMBERED FROM 3 TO 19 INCLUSIVE.



RUSSEL D. MORGAN, CSR
LICENSE #87-108442-7801

FEBRUARY 24, 2009

Tab 4

Title Insurance Law

By Joyce Palomar

Volume 2

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surance agents in most parts of the United States perform additional closing services. These include charging all taxes and fees against the property that are to be paid at closing;[3] preparing the instruments of conveyance called for in the purchase contract and other documents required to complete the transaction;[4] supervising the parties' execution of documents; presiding over the transfer of documents and funds; and recording title documents. In some states, allegations of the unauthorized practice of law limit the closing services that title insurance companies can provide to clerical tasks like filling in the blanks of a closing statement or standard form deed. *See* Chapter 13 identifying states where title insurance companies are prohibited from supervising closings or preparing mortgages and instruments of conveyance on the basis that these acts are the unauthorized practice of law.

§ 20:3 Title companies' duties as escrow and closing agents—General duties

An escrow or closing agent is considered to be the agent of all parties to the real estate transaction and, in most jurisdictions, bears a fiduciary relationship to each party.[1] The escrowee must comply strictly with the instructions of the principals; if he

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[3]*See, generally*, NYCTL 1996-1 Trust v. Malihan, 276 A.D.2d 443, 715 N.Y.S.2d 51 (1st Dep't 2000); Farkas v. Chicago Title Ins. Co., 71 Ohio App. 3d 633, 594 N.E.2d 1140 (8th Dist. Cuyahoga County 1991) (holding title insurance agent liable for error in prorating taxes).

[4]*See infra* § 20:5 and cases cited therein.

[Section 20:3]

[1]*See* West Knoxville Associates Ltd. Partnership v. Ticor Title Ins. Co., 124 F.3d 201 (6th Cir. 1997) ("An escrow holder occupies a fiduciary relationship with both the parties to the escrow agreement, and has attendant duties of loyalty, disclosure, and care, but the particular tasks with which the escrow holder is charged are those set forth in the escrow agreement."); Newman v. Great American Mortg. Investors, 87 842 La. App. 5 Cir. 7/26/88, 1988 WL 903143 (La. Ct. App. 5th Cir. 1988) ("Generally, the depositary is the agent or trustee of both parties . . .. It is the depository's duty to exercise ordinary skill and diligence, and due or reasonable care in his employment. In his fiduciary capacity, he must conduct the affairs with which he is entrusted with scrupulous honesty, skill and diligence."); Red Lobster Inns of America, Inc. v. Lawyers Title Ins. Corp., 492 F. Supp. 933, 941 (E.D. Ark. 1980), aff'd in part, rev'd in part on other grounds, 656 F.2d 381 (8th Cir. 1981); Mansur v. Security Search & Abstract Co. of Philadelphia, 1995 WL 365401 (E.D. Pa. 1995); Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119, 122 (1963); Claussen v. First America Title Guaranty Co., 186 Cal. App. 3d 429, 230 Cal. Rptr. 749, 752 (6th Dist. 1986); Kirby v. Palos Verdes Escrow Co., 183 Cal. App. 3d 57, 64, 227 Cal.

disburses the property of the principals in violation of instructions or otherwise breaches his fiduciary duty, he is liable to the injured parties for breach of contract. Similarly, it is the duty of the escrow holder to exercise ordinary skill and diligence in his employment and if he acts negligently, he is liable for any loss proximately occasioned by such negligence.[2]

Rptr. 785, 1 U.C.C. Rep. Serv. 2d 1386 (1st Dist. 1986) (disapproved of on other grounds by, Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co., 27 Cal. 4th 705, 27 Cal. 4th 1160a, 117 Cal. Rptr. 2d 541, 41 P.3d 548 (2002)) (stating that an "escrow holder is the limited agent and fiduciary of all parties to an escrow"); Garton v. Title Ins. & Trust Co., 106 Cal. App. 3d 365, 165 Cal. Rptr. 449, 457 (3d Dist. 1980); Spaziani v. Millar, 215 Cal. App. 2d 667, 30 Cal. Rptr. 658, 666 (4th Dist. 1963); Southern Cross Lumber & Millwork Co. v. Becker, 761 S.W.2d 269, 272 (Mo. Ct. App. E.D. 1988); Cano v. Lovato, 105 N.M. 522, 734 P.2d 762, 774 (Ct. App. 1986); Williams v. Land Title Co. of Dallas, 1997 WL 196345, *3 (Tex. App. Dallas 1997) (not designated for publication); Zimmerman v. First American Title Ins. Co., 790 S.W.2d 690, 694 (Tex. App. Tyler 1990), writ denied, (Nov. 14, 1990).

See also Splash Design, Inc. v. Lee, 103 Wash. App. 1036, 2000 WL 1772519 (Div. 1 2000) (unpublished). The court found that the escrowee breached his duty "to represent both buyer and seller neutrally" when he unilaterally stopped payment on the seller's check after uncertainty arose about the status of certain liens. The escrowee had argued that he was following escrow instructions to "hold all matters in their existing status" in the case of a dispute. The court disagreed:

> But there was not a dispute between the parties here. And Green did more than merely preserve the status quo. He actively intervened in the transaction when he returned the purchase price to the buyer, Lee, without returning the business to the seller. Nothing in the escrow documents gave Green the authority to step out of the advisory capacity created by the instructions and intervene in the transaction . . .. The evidence in the record supports only one conclusion: Green's conduct breached his fiduciary duty.

Contra Contawe v. Crescent Heights of America, Inc., not reported in F. Supp. 2d, 2004 WL 2244538 (E.D.Pa., Oct. 1, 2004); In re Johnson, 292 B.R. 821 (Bankr. E.D. Pa. 2003) (Pennsylvania does not automatically recognize a fiduciary relationship between the closing agent and borrower in a loan transaction without a showing that the closing agent established a special relation of trust with the borrower.). *Compare* Davis v. Lawyers Title Ins. Corp., 2007 WL 782158 (N.D. Ohio 2007) in which the court stated that Ohio has not recognized a general fiduciary duty between a title insurance company and a borrower, so that a complaint must allege existence of an agency relationship or a relationship involving special trust and confidence. The court did not decide that the relationship of escrow or closing agent is insufficient to create a fiduciary duty, since the borrower's complaint failed to state whether the title company served in that role or merely issued a policy.

[2]Kirk Corp. v. First American Title Co., 220 Cal. App. 3d 785, 270 Cal. Rptr. 24 (3d Dist. 1990) [citations omitted]. *See also* Newman v. Great American Mortg. Investors, 87 842 La. App. 5 Cir. 7/26/88, 1988 WL 903143 (La. Ct. App. 5th Cir. 1988) (stating "[i]t is the depositary's duty to exercise ordinary

Under common law, an escrow or closing agent's fiduciary duties are to (i) comply with the instructions of the principals; and (ii) exercise ordinary skill and diligence in its employment.[3] Therefore, upon accepting a purchase contract for escrow or closing, most jurisdictions hold that a title company assumes a duty to follow all explicit and implied instructions for escrow and closing and to perform all services undertaken with the skill and diligence reasonably expected of a real estate professional. These general duties apply to all the particular tasks the escrow or closing agent agrees to perform. An escrow or closing agent will be liable in contract for breaching any escrow or closing instructions and in tort for failing to exercise ordinary skill and diligence in

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skill and diligence and due or reasonable care in his employment. In his fiduciary capacity, he must conduct the affairs with which he is entrusted with scrupulous honesty, skill and diligence"); Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963); Amen v. Merced County Title Co., 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33, 35 (1962); Zang v. Northwestern Title Co., 135 Cal. App. 3d 159, 185 Cal. Rptr. 176, 180 (1st Dist. 1982); Garton v. Title Ins. & Trust Co., 106 Cal. App. 3d 365, 165 Cal. Rptr. 449, 457–458 (3d Dist. 1980); Axley v. Transamerica Title Ins. Co., 88 Cal. App. 3d 1, 151 Cal. Rptr. 570, 574 (4th Dist. 1978), *citing* Lee v. Title Ins. & Trust Co., 264 Cal. App. 2d 160, 162, 70 Cal. Rptr. 378 (5th Dist. 1968); Banville v. Schmidt, 37 Cal. App. 3d 92, 112 Cal. Rptr. 126, 135 (3d Dist. 1974); Wade v. Lake County Title Co., 6 Cal. App. 3d 824, 86 Cal. Rptr. 182, 184 (1st Dist. 1970); National Bank of Washington v. Equity Investors, 81 Wash. 2d 886, 506 P.2d 20, 35 (1973); Styrk v. Cornerstone Investments, Inc., 61 Wash. App. 463, 810 P.2d 1366 (Div. 1 1991).

In some jurisdictions, the "economic loss rule" may prevent a cause of action in tort for breach of a closing instruction contract. *See* Lehman Bros. Holdings, Inc. v. Hirota, not reported in F. Supp. 2d, 2007 WL 1471690 (M.D. Fla., 2007). *But see* TierOne Bank v. U.S. Money Source, Inc., 2007 WL 2904187 (D. Neb. 2007).

[3]*See* cases cited *supra*. *See also* Executive Management, Ltd. v. Ticor Title Ins. Co., 114 Nev. 823, 963 P.2d 465 (1998); Webster v. USLife Title Co., 123 Ariz. 130, 598 P.2d 108, 111 (Ct. App. Div. 1 1979) (An "escrow agent is a trustee of funds deposited in escrow and must be guided in its duty by what the escrow agreement says and act strictly in accordance with the escrow instructions"); Southern Cross Lumber & Millwork Co. v. Becker, 761 S.W.2d 269, 272 (Mo. Ct. App. E.D. 1988); Bescor, Inc. v. Chicago Title & Trust Co., 113 Ill. App. 3d 65, 68 Ill. Dec. 812, 446 N.E.2d 1209 (1st Dist. 1983); Williams v. Land Title Co. of Dallas, 1997 WL 196345, *3 (Tex. App. Dallas 1997) (not designated for publication) ("An escrow agent has the duty to follow the agreed terms of the underlying contract and the absolute duty to carry out the terms of the agreement creating the escrow agency."); Rianda v. San Benito Title Guarantee Co., 35 Cal. 2d 170, 217 P.2d 25 (1950) (stating that an escrow agent must follow the instructions of principals and carry out its duties with "reasonable skill and ordinary diligence").

any aspect of its employment.[4]

A valid underlying contract is required to support an escrow

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[4]*See, e.g.*, Zimmerman v. First American Title Ins. Co., 790 S.W.2d 690, 694 (Tex. App. Tyler 1990), writ denied, (Nov. 14, 1990). According to the purchase contract, real estate agents who arranged for the sale of 48 lots were to receive "free and clear" title to lot 80 in lieu of a cash commission. The purchaser's lender informed the local title company that the purchaser's promissory note was to be secured by a deed of trust covering all 48 lots. The title company closed the sale in accordance with the information given by the lender. After closing, the purchaser conveyed lot 80 to the real estate agents, but lot 80 was subject to the lender's newly created lien. In holding the title company liable, the Zimmerman court stated:

> The title company disregarded [the] instructions of the contracting parties and without disclosure to anyone created a lien on lot 80 in favor of the Lindale Bank. That was a significant alteration of an important provision of the agreement, and a breach, not only of the title company's duty to [the agents], but also of its duty to the buyer and seller 'to exercise due care to carry out the terms of the agreement.'

Zimmerman v. First American Title Ins. Co., 790 S.W.2d 690, 695 (Tex. App. Tyler 1990), writ denied, (Nov. 14, 1990).

See also Amen v. Merced County Title Co., 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33, 35 (1962); Ruth v. Lytton Sav. & Loan Ass'n of Northern Cal., 266 Cal. App. 2d 831, 72 Cal. Rptr. 521 (1st Dist. 1968), opinion corrected, 272 Cal. App. 2d 24, 76 Cal. Rptr. 926 (1st Dist. 1969) and (disapproved of on other grounds by, Hatch v. Collins, 225 Cal. App. 3d 1104, 275 Cal. Rptr. 476 (1st Dist. 1990)) (holding the title company liable for breach of contract where the company recorded plaintiff's deed of trust in violation of escrow instructions conditioning the subordination of plaintiff's lien to a construction loan and failed to inform plaintiff prior to closing that the interest rate for the loan did not comply with the interest rate required by the escrow instructions). *See also* Jacobsen, Comment, California Escrow Agents: A Duty to Disclose Known Fraud? 17 Pac. L. J. 309, 315 (1985); and TierOne Bank v. U.S. Money Source, Inc., 2007 WL 2904187 (D. Neb. 2007) (holding mortgage originator liable to warehouse lender under breach of contract, negligent misrepresentation, and common law negligence for (1) submitting funding requests with representations and covenants containing false and inaccurate information; (2) failing to ensure a valid first lien on the real estate for which the loans were made; and (3) failing to supply eligible notes and sell the loans to third-party investors).

The "economic loss rule" cited *supra* n. 2 does not eliminate tort claims by one contracting party against the other based upon torts arising from the contractual setting if the complaining party can show that the tort is independent of the breach of contract. Chicago Title Ins. Co. v. Commonwealth Forest Investments, Inc., 494 F. Supp. 2d 1332 (M.D. Fla. 2007); Lehman Brothers Holdings, Inc. v. Hirota, not reported in F. Supp. 2d, 2007 WL 1471690 (M.D.Fla. ,2007) (holding that lender's allegations that closing agent failed to disclose secondary financing of the properties and the borrower's excessive closing cost payments supported claims for breach of closing instruction contract and Closing Protection Letter, but that the economic loss rule prevented claims for the same conduct under theories of negligent misrepresentation and breach of fiduciary duty).

agreement.[5] The parties to the escrow must have agreed on the terms that govern the escrow holder's delivery of the deposited items.[6] The escrow agreement between the parties must be clear and definite.[7] The parties to an escrow often give the depositary specific written instructions setting forth the terms for the escrow arrangement.[8] Nevertheless, the instructions may be oral,[9] though oral instructions will not be permitted to modify written

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[5]*See* West Knoxville Associates Ltd. Partnership v. Ticor Title Ins. Co., 124 F.3d 201 (6th Cir. 1997) ("An escrow agreement 'is in essence a contractual undertaking to assure the carrying out of obligations already contracted for.' "); Cloud v. Winn, 1956 OK 267, 303 P.2d 305, 308 (Okla. 1956) ("In order that [the] instrument may operate as an escrow . . . there must be a valid contract between the parties as to the subject matter of the instrument and the delivery . . ."); Bowles v. Key Title Co., 163 Or. App. 9, 986 P.2d 1236, 1241 (1999); Williams v. Land Title Co. of Dallas, 1997 WL 196345 (Tex. App. Dallas 1997) (not designated for publication).

[6]Scholz Homes, Inc. v. Wallace, 590 F.2d 860, 863, 4 Fed. R. Evid. Serv. 205 (10th Cir. 1979); Cloud v. Winn, 1956 OK 267, 303 P.2d 305, 308 (Okla. 1956); Williams v. Land Title Co. of Dallas, 1997 WL 196345 (Tex. App. Dallas 1997) (not designated for publication).

[7]Scholz Homes, Inc. v. Wallace, 590 F.2d 860, 863, 4 Fed. R. Evid. Serv. 205 (10th Cir. 1979); Cloud v. Winn, 1956 OK 267, 303 P.2d 305, 308 (Okla. 1956); Williams v. Land Title Co. of Dallas, 1997 WL 196345 (Tex. App. Dallas 1997) (not designated for publication). *But see* Lechner v. Halling, 35 Wash. 2d 903, 216 P.2d 179, 185 (1950). A court may, however, consider parol evidence if the terms of the escrow are not clear. The Lechner court stated:

> When there is a deposit of instruments, allegedly in escrow, and conflict in the testimony as to the understanding of the parties relative to the conditions of the deposit, it is proper for the court to inquire into the facts and circumstances surrounding the transaction, in order to determine first, whether the parties intended a true conditional delivery, and second, whether they were in agreement as to the nature of the conditions, performance of which would authorize the depositary to convey to the grantee.

Lechner v. Halling, 35 Wash. 2d 903, 216 P.2d 179, 185 (1950).

[8]*See* Vandeventer v. Dale Const. Co., 277 Or. 817, 562 P.2d 196 (1977); Cloud v. Winn, 1956 OK 267, 303 P.2d 305, 308 (Okla. 1956) (citing C.J.S., page 1200 § 6); Williams v. Land Title Co. of Dallas, 1997 WL 196345 (Tex. App. Dallas 1997) (not designated for publication) ("an escrow agreement customarily is a written instrument containing a carefully drawn list of instructions that defines the duties of the escrow agent").

[9]Claussen v. First America Title Guaranty Co., 186 Cal. App. 3d 429, 230 Cal. Rptr. 749, 752 (6th Dist. 1986); Zang v. Northwestern Title Co., 135 Cal. App. 3d 159, 185 Cal. Rptr. 176, 181 (1st Dist. 1982); Cano v. Lovato, 105 N.M. 522, 734 P.2d 762, 774 (Ct. App. 1986); Williams v. Land Title Co. of Dallas, 1997 WL 196345 (Tex. App. Dallas 1997) (not designated for publication), *citing* Simpson v. Green, 231 S.W. 375, 377 (Tex. Comm'n App. 1921).

instructions.[10] Instructions also may be implied from the express instructions given to the escrow holder.[11]

Courts generally require strict compliance with escrow instructions.[12] Any change to the terms of the escrow after de-

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[10]Scholz Homes, Inc. v. Wallace, 590 F.2d 860, 4 Fed. R. Evid. Serv. 205 (10th Cir. 1979); Osborn v. Grego, 226 Kan. 212, 596 P.2d 1233 (1979); Katleman v. U. S. Communities, Inc., 197 Neb. 443, 249 N.W.2d 898 (1977).

[11]Amen v. Merced County Title Co., 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33, 35 (1962) (stating that an escrow agent will be liable for breaching an escrow instruction "that it had contracted to perform or . . . an implied promise arising out of the agreement with the buyer or seller"); Kirk Corp. v. First American Title Co., 220 Cal. App. 3d 785, 270 Cal. Rptr. 24 (3d Dist. 1990) (holding that the recordation of a cancellation of lease was not a breach of the escrow agent's duties where the recordation of such cancellation was implied from the escrow instructions); Claussen v. First America Title Guaranty Co., 186 Cal. App. 3d 429, 230 Cal. Rptr. 749, 753 (6th Dist. 1986).

[12]*See* Amen v. Merced County Title Co., 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33, 35 (1962); Kirk Corp. v. First American Title Co., 220 Cal. App. 3d 785, 270 Cal. Rptr. 24 (3d Dist. 1990); Garton v. Title Ins. & Trust Co., 106 Cal. App. 3d 365, 165 Cal. Rptr. 449, 457 (3d Dist. 1980) ("An escrow holder bears a fiduciary relationship to each party to the escrow and must comply strictly with the instructions of the principals . . .. If an escrow holder violates the instruction liability attaches for breach of contract."); Diaz v. United California Bank, 71 Cal. App. 3d 161, 139 Cal. Rptr. 314, 321 (2d Dist. 1977); Commonwealth Land Title Ins. Co. v. Leidner, 169 A.D.2d 699, 564 N.Y.S.2d 187 (2d Dep't 1991); Styrk v. Cornerstone Investments, Inc., 61 Wash. App. 463, 810 P.2d 1366 (Div. 1 1991) ("When the required debt/appraisal ratio was not met . . ., the escrow agent could not close the transaction in full compliance with his instructions"); Newman v. Great American Mortg. Investors, 87 842 La. App. 5 Cir. 7/26/88, 1988 WL 903143 (La. Ct. App. 5th Cir. 1988) (stating that the escrow holder "must act strictly in accordance with the instructions and terms of the escrow agreement and is liable for departures therefrom"); Webster v. USLife Title Co., 123 Ariz. 130, 598 P.2d 108, 111 (Ct. App. Div. 1 1979); Fretz v. First American Title Ins. Co., 161 Ariz. 174, 777 P.2d 672 (Ct. App. Div. 1 1989). In Fretz, the purchase agreement provided that Misztal would pay part of the purchase price in cash at closing and give the seller a promissory note for the remaining amount, secured by a deed of trust. A local office of First American Title Insurance Company was the escrow and closing agent for the sale and the trustee under the deed of trust. The purchase agreement also provided that the agents' commission was to be treated as a separate escrow and be paid as follows: (i) 50% upon closing of the first 8 acres of the tract; and (ii) 50% upon closing of the remaining 9 acres. The escrow agreement for the sale included a provision obligating the seller to direct the trustee under the deed of trust to use all proceeds to satisfy seller's obligations with respect to the land.

The agents received 50% of their commission at the closing for the first 8 acres, which occurred in March of 1985. The purchaser defaulted on his balloon payment for the 9-acre parcel and the seller instructed First American to initiate a trustee's sale. First American wired the proceeds of the sale directly to the seller without payment of the remaining commissions to the agents. The agents

posit with the escrow holder must be approved by all principals to the escrow.[13] Once deposited in escrow, an instrument passes beyond the control of the depositor and the depositor may not recall it.[14] Unless all parties agree to modify escrow instructions, the escrowee must implement the original instructions received, even if one party directs the escrowee otherwise.[15] An oral in-

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sued for payment of the commissions, claiming that First American violated the escrow instructions for the sale transaction. First American argued the escrow instructions for the purchase transaction were only applicable if the purchaser made the required balloon payment and that it had received the sale proceeds in its capacity as trustee, not as escrow agent. An Arizona statute discussing the distribution of proceeds from a trustee's sale provided that the trustee should apply proceeds, first, to the costs and expenses of exercising the power of sale; second, to the payment of the contract secured by the trust deed; and, third, to payment of all other obligations provided in or secured by the trust deed.

The court held that the language in the escrow instructions obligating the trustee to discharge the seller's obligations with respect to the land controlled. "[O]nce First American came into possession of the proceeds of the trustee's sale, it was required by its escrow instructions to pay the balance of appellee's commissions out of those proceeds before forwarding the remainder to [seller]." Fretz v. First American Title Ins. Co., 161 Ariz. 174, 777 P.2d 672, 673–674 (Ct. App. Div. 1 1989). This case suggests that compliance with the escrow instructions takes precedence over other obligations of the escrow holder that are related to the transaction.

[13]Newman v. Great American Mortg. Investors, 87 842 La. App. 5 Cir. 7/26/88, 1988 WL 903143 (La. Ct. App. 5th Cir. 1988) (holding that a change to the escrow agreement pursuant to the request of one party but without the other party's knowledge constituted a breach of the escrow holder's fiduciary duty); Gattozzi v. Midland First American Nat. Title, 2000 WL 1369890 (Ohio Ct. App. 8th Dist. Cuyahoga County 2000) (unpublished); Ogdahl v. Title Ins. & Trust Co., 72 Cal. App. 3d Supp. 41, 140 Cal. Rptr. 148 (App. Dep't Super. Ct. 1977) (disapproved of on other grounds by, Contemporary Investments, Inc. v. Safeco Title Ins. Co., 145 Cal. App. 3d 999, 193 Cal. Rptr. 822 (4th Dist. 1983)) (holding that sellers could not unilaterally rescind escrow instructions); Wade v. Lake County Title Co., 6 Cal. App. 3d 824, 86 Cal. Rptr. 182, 184 (1st Dist. 1970) ("After written instructions signed by each party are deposited with the escrow holder, neither can change his instructions without the concurrence of the other"). *See also* Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963) (commenting that an "escrow agent is held to strict compliance with the terms of the escrow agreement, and is liable for all damages resulting from any deviation.").

[14]Scholz Homes, Inc. v. Wallace, 590 F.2d 860, 863, 4 Fed. R. Evid. Serv. 205 (10th Cir. 1979); Cloud v. Winn, 1956 OK 267, 303 P.2d 305, 309 (Okla. 1956); Newman v. Great American Mortg. Investors, 87 842 La. App. 5 Cir. 7/26/88, 1988 WL 903143 (La. Ct. App. 5th Cir. 1988); Lechner v. Halling, 35 Wash. 2d 903, 216 P.2d 179, 185 (1950).

[15]*See* Scholz Homes, Inc. v. Wallace, 590 F.2d 860, 4 Fed. R. Evid. Serv.

quiry as to the status of the escrow does not constitute an amendment to the escrow instructions.[16]

Upon performance of the conditions set forth in the escrow agreement, the escrow holder must deliver the deposited items in accordance with the escrow instructions.[17] If an escrow agent is unsure of its instructions, it is obligated to seek clarification of such instructions before proceeding.[18] Thus, where escrow instruc-

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205 (10th Cir. 1979); Katleman v. U. S. Communities, Inc., 197 Neb. 443, 249 N.W.2d 898 (1977); Newman v. Great American Mortg. Investors, 87 842 La. App. 5 Cir. 7/26/88, 1988 WL 903143 (La. Ct. App. 5th Cir. 1988); Gattozzi v. Midland First American Nat. Title, 2000 WL 1369890 (Ohio Ct. App. 8th Dist. Cuyahoga County 2000) (unpublished); Lacy v. Ticor Title Ins. Co., 794 S.W.2d 781 (Tex. App. Dallas 1990), writ granted, (Nov. 28, 1990) and writ denied with per curiam opinion, 803 S.W.2d 265 (Tex. 1991) and writ withdrawn, (Jan. 30, 1991); Dickens v. First American Title Ins. Co. of Arizona, 162 Ariz. 511, 784 P.2d 717 (Ct. App. Div. 2 1989); Ogdahl v. Title Ins. & Trust Co., 72 Cal. App. 3d Supp. 41, 140 Cal. Rptr. 148 (App. Dep't Super. Ct. 1977) (disapproved of by, Contemporary Investments, Inc. v. Safeco Title Ins. Co., 145 Cal. App. 3d 999, 193 Cal. Rptr. 822 (4th Dist. 1983)) (holding that sellers could not unilaterally rescind escrow instructions). *Compare* Osborn v. Grego, 226 Kan. 212, 596 P.2d 1233 (1979).

[16]Claussen v. First America Title Guaranty Co., 186 Cal. App. 3d 429, 230 Cal. Rptr. 749, 754 (6th Dist. 1986) (holding that an inquiry by one party to the escrow regarding the status of funds on deposit did not constitute an instruction to hold closing pending receipt of expected funds). The Claussen court also noted that it is not customary to turn an inquiry into an instruction. Claussen v. First America Title Guaranty Co., 186 Cal. App. 3d 429, 230 Cal. Rptr. 749, 754 (6th Dist. 1986).

[17]*See* Newman v. Great American Mortg. Investors, 87 842 La. App. 5 Cir. 7/26/88, 1988 WL 903143 (La. Ct. App. 5th Cir. 1988); Lechner v. Halling, 35 Wash. 2d 903, 216 P.2d 179, 185 (1950).

[18]*See* Burkons v. Ticor Title Ins. Co. of California, 168 Ariz. 345, 813 P.2d 710 (1991) (holding that "unless it should be determined from the evidence that the parties intended to give the Tower lien unconditional priority, Ticor breached its contractual obligations by giving Ticor priority without obtaining clarification before proceeding."); Kirk Corp. v. First American Title Co., 220 Cal. App. 3d 785, 270 Cal. Rptr. 24 (3d Dist. 1990) (stating that an escrow holder is obliged to take corrective steps before obeying questionable instructions); Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co., 185 Cal. App. 3d 1149, 230 Cal. Rptr. 276, 278 (1st Dist. 1986); Diaz v. United California Bank, 71 Cal. App. 3d 161, 139 Cal. Rptr. 314, 321 (2d Dist. 1977); Spaziani v. Millar, 215 Cal. App. 2d 667, 682, 30 Cal. Rptr. 658 (4th Dist. 1963).

See also Suitts v. First Sec. Bank of Idaho, N.A., 100 Idaho 555, 602 P.2d 53, 58 (1979) (holding that an escrowee violated the terms of the escrow by failing to request clarification of the parties' rights). In the Suitts case, the Suitts were going to purchase property, cattle and farm equipment from the McMurtreys over a period of time. A land sale contract, bill of sale, warranty deed from the McMurtreys to the Suitts, and a quitclaim deed from the Suitts

tions were silent as to the terms of a first deed of trust to which the seller agreed to subordinate the purchaser's purchase-money deed of trust, the title company could be liable for effecting the transfer without first determining the seller's intentions.[19]

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back to the McMurtreys were placed in an escrow account at First Security Bank. The purchase contract provided that the documents in escrow would be delivered to the Suitts upon payment of the purchase price. The escrow contract contained a provision that allowed the escrow holder to withhold delivery and decline to make further payments until the rights, powers and duties under the escrow contract were settled between the parties or by final judicial action.

Prior to complete payment of the purchase price, disputes arose between the parties concerning the legal description for the land and an easement. The Suitts filed a suit ("first case") to settle these disputes. The trial court ruled in the Suitts favor, holding that the property description should be reformed and that an obstruction in the easement must be removed. The McMurtreys immediately appealed the trial court's decision. While the appeal was pending, the Suitts tendered the remainder of the purchase price to First Security. First Security accepted the payment and tendered it to the McMurtreys. The McMurtreys refused to accept the payment. First Security notified both parties that it was holding the escrow at status quo until the rights, duties and powers of the parties became finally determined by judicial action. Suitts v. First Sec. Bank of Idaho, N.A., 100 Idaho 555, 602 P.2d 53, 55 (1979).

The Suitts then commenced a second action ("second case") against First Security and the McMurtreys for wrongful failure to deliver the escrow documents. The Idaho Supreme Court determined in the appeal of the second case that, under the escrow agreement, if the escrow holder was going to withhold delivery, the holder must also refuse to accept further payments. The court reasoned, "it was incumbent upon First Security to take affirmative steps to seek clarification of its duties under the escrow agreement." Suitts v. First Sec. Bank of Idaho, N.A., 100 Idaho 555, 602 P.2d 53, 58 (1979). The second part of the clause in the escrow contract allowing the escrow holder to obtain clarification of the parties' rights by judicial action, in the court's opinion, contemplated the escrow holder filing an interpleader action. "The responsibility of the escrow holder to seek clarification of its duties under the terms of the escrow was not satisfied by merely holding the escrow in limbo while it awaited the outcome of an appeal in an action brought by the parties to determine their rights and duties under the sales contract." Suitts v. First Sec. Bank of Idaho, N.A., 100 Idaho 555, 602 P.2d 53, 58–59 (1979).

[19]The California Court of Appeals held in Spaziani v. Millar, 215 Cal. App. 2d 667, 682, 30 Cal. Rptr. 658 (4th Dist. 1963) that an escrow agent's failure to clarify its instructions prior to closing the escrow could be a breach of its fiduciary duties. In Spaziani, the plaintiff obtained a real estate broker's assistance in selling two adjoining pieces of land improved with rental homes. The broker was unable to sell the lots but informed the plaintiff that he wanted to purchase the lots. The plaintiff told the broker that she would "throw in" two additional unimproved lots located behind the listed lots if the broker purchased the same. The broker agreed to purchase the property for $22,000 by "securing a first deed of trust for approximately $10,000 on the front portion of the land where the houses were located" and he "would give her $2,000 down and she would carry

A failure to do something not required by the instructions is

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the second trust deed back for the difference of [the] purchase price." Spaziani v. Millar, 215 Cal. App. 2d 667, 30 Cal. Rptr. 658, 660 (4th Dist. 1963). The broker alleged that he told the plaintiff that he wanted the rear portion of the property free and clear in anticipation of developing such property.

Shortly after the parties agreed to the above terms, the broker prepared a deposit receipt agreement that provided as follows:

> $2,000 down Balance $20,000 payable $120 per mo including 6% interest subordinated to a $10,000 trust deed payable $120 mo incl. 6% with release of 120 × 150 with easement to Holly St. Trust deed to be divided on each property proportionately— Buyer pay escrow. Interest at 6% per annum on unpaid portion of the purchase price to be included in the prescribed payments and possession given close of escrow.

Spaziani v. Millar, 215 Cal. App. 2d 667, 30 Cal. Rptr. 658, 661 (4th Dist. 1963).

The plaintiff signed the deposit receipt agreement and the broker took it to a title company for preparation of escrow instructions in accordance with the agreement. The escrow instructions provided that a first deed of trust would be for a construction loan and that a second deed of trust would be given to the plaintiff. The instructions provided further that both deeds of trust were limited to the south portion of the property containing the rental homes. The broker subsequently obtained a loan for "purchase assistance" from Arrowhead Savings and Loan Association. When a loan officer from Arrowhead read the escrow instructions he noticed that the first deed of trust referred to a construction loan. The loan officer called the title company to inquire about the matter and was told that the construction loan referred to a different obligation. Without obtaining any further direction from the plaintiff, the title company proceeded to close the transaction.

After making three payments on his loan obligations, the broker defaulted. Arrowhead instituted foreclosure proceedings and the plaintiff brought suit against the title company for negligence and fraud. After discussing the fiduciary duties of an escrow holder, the court concluded:

> In the case at bar, there was evidence from which the trial court could have found that the escrow holder proceeded to effect a transfer of the plaintiff's title to [the broker] without determining her intention with respect to the terms of the first deed of trust to be placed against that property which was to take precedence over the deed of trust securing payment to her of the balance of the purchase price, and from the facts it also could have found that the escrow holder was negligent in the discharge of its duty to exercise due skill and diligence in the performance of its agreement with the plaintiff. In substance, the action of the escrow holder in causing recordation of the deed from the plaintiff to [the broker] without instructions from her respecting the terms of the deed of trust which was to precede that given as security for payment of the purchase price balance, amounted to an exercise of authority without first determining the conditions under which that authority might be exercised or, stated otherwise, constituted a disposition of the plaintiff's property without instructions in the premises because the instructions given were meaningless.

Spaziani v. Millar, 215 Cal. App. 2d 667, 677, 30 Cal. Rptr. 658 (4th Dist. 1963). *See also* Burkons v. Ticor Title Ins. Co. of California, 168 Ariz. 345, 813 P.2d 710 (1991) (holding that "unless it should be determined from the evidence that the parties intended to give the Tower lien unconditional priority, Ticor breached its contractual obligations by giving Ticor priority without obtaining clarification before proceeding.").

not a breach of the escrow agreement or a breach of contract.[20] The California Court of Appeals held that "no liability attaches to the escrow holder for his failure to do something not required by the terms of the escrow or for a loss incurred while obediently following his escrow instructions."[21] This should not be taken to mean, however, that a title company serving as escrow and closing agent has no duty to take the initiative to inform parties of facts material to the transaction or to act in compliance with common real estate practices when the parties reasonably rely on the company's having assumed the role of real estate professional for the transaction. A title company agreeing to act as closing agent may be liable in tort for failing to exercise ordinary skill and care in any aspect of managing the closing of the transaction, including, but not limited to, drafting instruments of conveyance, supervising the execution of instruments, supervising the transfer of documents and funds, and recording title documents.[22] The title company also must be able to identify a situation be-

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[20]For example, in Axley v. Transamerica Title Ins. Co., 88 Cal. App. 3d 1, 151 Cal. Rptr. 570, 574 (4th Dist. 1978), the California Court of Appeals held that a title company serving as escrowee was not liable for failing to point out that an amendment to the transaction diminished the seller's security. *See also* Siegel v. Fidelity Nat. Title Ins. Co., 46 Cal. App. 4th 1181, 1194, 54 Cal. Rptr. 2d 84 (2d Dist. 1996).

[21]Axley v. Transamerica Title Ins. Co., 88 Cal. App. 3d 1, 151 Cal. Rptr. 570, 574 (4th Dist. 1978).

[22]*See* In re Opinion No. 26 of Committee on Unauthorized Practice of Law, 139 N.J. 323, 654 A.2d 1344, 1362 (1995):

> Any broker participating in a transaction where buyer and seller are not represented should have the experience and knowledge required at least to identify a situation where independent counsel is needed. Under those circumstances the broker has a duty, in accordance with the standards of the profession, to inform either seller or buyer of that fact. Presumably, the same duty applies to any title officer . . . who becomes aware of the need of either party for independent counsel. In addition to whatever potential action might be taken by the bodies that regulate brokers and title officers, as well as by their own associations, their failure to inform exposes them to the risk of civil liability for resulting damages. . .. Not only did the escrow instructions state that Title Insurance was to record all papers, the normal exigencies of the situation called for them to do so. The act of recording is in their line of business—a normal part of their duties, not an exception. Part of the expectancies of ordinary laymen . . . is that the escrow agent will record the necessary documents.

Allen v. Webb, 87 Nev. 261, 485 P.2d 677, 681 (1971):

> Title Insurance orally promised to record [the trust deed] and the eminence, experience and knowledge of Title Insurance in its field is that of handling the minutiae of real estate closings. From their superior knowledge flowed a duty to their clients . . . to do such things as recording documents or advise them when they did not. Theirs is the knowledge of a lawyer. In fact, they acted the part in preparing the documents.

Accord Ford v. Guarantee Abstract & Title Co., Inc., 220 Kan. 244, 553 P.2d 254, 264 (1976) (holding that, because title companies now perform a service

yond its expertise and advise the seller or buyer when they should consult an independent attorney.[23] If the title company proceeds with a complex transaction, it assumes the duty to exercise the skill and care of a real estate professional able to manage such a transaction.[24] *See infra* §§ 20:4, 20:5.

§ 20:4 Title companies' duties as escrow and closing agents—Duty to disclose and inform

A title insurance company that serves as escrow and closing agent has a fiduciary duty to communicate knowledge of material facts acquired in the course of its agency to its principals.[1] Facts material to the parties to the escrow include title matters, fraud,

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that was formerly provided by attorneys, their standard of care is equivalent to the standard of care expected of attorneys). *See, generally,* Morley v. J Pagel Realty and Ins., *27 Ariz. App. 62, 550 P.2d 1104 (Div. 2 1976).*

[23]*See* In re Opinion No. 26 of Committee on Unauthorized Practice of Law, 139 N.J. 323, 654 A.2d 1344, 1362 (1995); Allen v Webb, 87 Nev. 261, 485 P.2d 677, 681 (1971).

[24]*See* In re Opinion No. 26 of Committee on Unauthorized Practice of Law, 139 N.J. 323, 654 A.2d 1344, 1362 (1995); National Bank of Washington v. Equity Investors, 81 Wash. 2d 886, 506 P.2d 20 (1973); Allen v. Webb, 87 Nev. 261, 485 P.2d 677, 681 (1971).

[Section 20:4]

[1]*See* West Knoxville Associates Ltd. Partnership v. Ticor Title Ins. Co., 124 F.3d 201 (6th Cir. 1997) ("An escrow holder occupies a fiduciary relationship with both the parties to the escrow agreement, and has attendant duties of loyalty, disclosure, and care . . .."); Home Loan Corp. v. Texas American Title Co., 191 S.W.3d 728 (Tex. App. Houston 14th Dist. 2006), reh'g overruled, (May 18, 2006) and review denied, (June 1, 2007); Diaz v. United California Bank, 71 Cal. App. 3d 161, 139 Cal. Rptr. 314, 320 (2d Dist. 1977); Spaziani v. Millar, 215 Cal. App. 2d 667, 682, 30 Cal. Rptr. 658 (4th Dist. 1963) ("The obligation of an escrow holder to disclose to his principal information acquired by him in the course of his employment must be viewed in the light of the fiduciary relationship existing between them"). *See also* Sanders v. Park Towne, Ltd., 2 Kan. App. 2d 313, 578 P.2d 1131, 1135 (1978); Cano v. Lovato, 105 N.M. 522, 734 P.2d 762, 774 (Ct. App. 1986); Williams v. Land Title Co. of Dallas, 1997 WL 196345 (Tex. App. Dallas 1997) (not designated for publication).

Compare Contawe v. Crescent Heights of America, Inc., not reported in F. Supp. 2d, 2004 WL 2244538 (E.D.Pa. 2004); In re Johnson, 292 B.R. 821 (Bankr. E.D. Pa. 2003) (Pennsylvania does not automatically recognize a fiduciary relationship between the closing agent and borrower without a showing that the closing agent established a special relation of trust with the borrower.) *See also* Davis v. Lawyers Title Ins. Corp., 2007 WL 782158 (N.D. Ohio 2007), holding that Ohio has not recognized a general fiduciary duty between a title insurance company and a borrower, but not determining whether a fiduciary duty would exist if the plaintiff had alleged that the title insurance company was serving as escrow and closing agent. The court held that whether the title insurance